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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK,

WITH ANNOTATIONS,

By JOHN POWER.

VOL. I

ALBANY, N. Y.
W. C. LITTLE & CO.,
1901.

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PREFACE.

No series of surrogate's reports has been published since that completed by Theodore Connelly in 1891. Since that time the opinions rendered by the surrogates of New York have appeared scattered through more than seven different sets of reports and legal newspapers. It is unnecessary to demonstrate the advantage to the busy practitioner of having at his hand a series containing *all* the decisions upon so important a subject. It is with the intention of meeting such a demand that the work has been once more resumed.

In addition to the decisions, valuable notes have been prepared and references made to cases affirmed or reversed.

With the hope that the present series will meet with the generous reception accorded to its predecessors, it is submitted to the legal profession.

Albany, Oct. 1, 1901. ,

JOHN POWER.

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REPORTS OF CASES

· ARGUED AND DETERMINED IN

THE SURROGATE'S COURTS

OF

THE STATE OF NEW YORK.

Matter of BLAUVELT.

(Surrogate's Court, Rockland County, December, 1890.)

Note.—The decision in this case, a full report of which appears in 2 Con. 458, and which was affirmed by the General Term, 39 St. Rep. 774, 60 Hun, 394, was reversed by the Court of Appeals, 131 N. Y. 249, 43 St. Rep. 285.

In the Matter of the Judicial Settlement of the Estate of JAMES
L. COLLARD, deceased.

(Surrogate's Court, Orange County, Filed November 2, 1891.)

EXECUTORS AND ADMINISTRATORS—PROPERTY SET APART FOR WIDOW—LAWS
1889, CHAP. 406.

Where the personal property is not sufficient to make up the amount
required so that the widow may receive a full \$1,000, the proceeds of

real property converted by sale under the will cannot be considered as personal property under the statute and used to make up the deficiency. In such case, however, she takes all the personal property free from any charge for debts or expenses of administration.

Judicial Settlement.

C. G. Gill, for executors; George H. Decker, for widow.

COLEMAN, S.—James L. Collard died August 30, 1889, leaving a will which has been admitted to probate. At the time of his death he was the owner of a farm which has since been sold by the executors for \$4,062.50. The farm was subject to a mortgage for \$1,000 which was signed by his widow. Deceased also had about \$300 of personal property. The deceased left a widow, who was childless, but children by a former marriage survived him.

The question now to be determined is what are the rights of the widow under chap. 406, Laws of 1889.

Section 1 of that act, giving \$1,000 to the widow from the estate of the deceased does not apply in this case, the deceased not having died intestate.

In ascertaining the rights of the widow under the provisions of section 2 of the act, following the rule laid down in the Matter of Daggett, 29 St. Rep. 864, which was affirmed in General Term and reported in 37 id. 810, overruling the decision in the Matter of Steward, 30 id. 438, we must ascertain the present value of her dower, which is \$307.41, and to this must be added the \$150 given her by statute, making together the sum of \$457.41. To this latter sum must be added, from the personal property, \$542.59, to make up the required sum of \$1,000, if there is so much, or, if there is not so much, what remains.

The personal property is not sufficient to make up the amount required so that the widow may receive a full \$1,000. And this raises the further question whether the conversion of the real estate into personalty by the sale under the will makes the proceeds of the sale personal property within the meaning of the act.

I think not. The amount to be set apart from the personal property to make up the \$1,000 is to be ascertained and set apart by the appraisers, whose acts relate only to property as it was left by deceased. The deceased could not direct a conversion of the real into personalty which would defeat the dower, and being considered real for the purposes of the dower it cannot at the same time be considered personal for the purposes of the act. The rights given the widow by this act are received by her independently of the will, and they are therefore to be determined by the nature and character of the property before being affected by the will. In this case the widow therefore has no claim to the proceeds of the sale of the real estate other than the value of her dower right; she, however, takes all the personal property free from any charge for debts or expense of administration. *Matter of Daggett, supra.*

In the Matter of the Guardianship of LOUIS H. PATTERSON,
a minor.

(*Surrogate's Court, Westchester County, Filed July, 1891.*)

GUARDIANS—BOND.

The fact that the estate or fund has been diminished by unavoidable losses or payments of claims, furnishes no ground for reducing the penalty of the bond given by a general guardian, even though the guardian is obliged to compensate the surety in proportion to the amount of the bond.

Application to reduce amount of guardian's bond.

In October, 1887, William Patterson, of Albany, was appointed the general guardian of the above named minor. The penalty of the bond given by him, based upon the rental value of certain real estate owned by the minor in the city of Yonkers, and of his personal estate, valued at \$600, was fixed at \$2,100. He filed such bond with the Fidelity & Casualty Company of

the city of New York as surety. The guardian now presents a petition stating, erroneously, that the amount of the penalty of the bond is \$2,500, and "that the only property which has come into the hands of your petitioner as general guardian of said Louis II. Patterson, and not paid out and accounted for, is the sum of \$153.46, received by him September 13, 1889." He also alleges that the real estate has been sold by order of the Supreme Court, and his ward's share thereof deposited with the county treasurer of Westchester County to the credit of said ward, to be paid to him on his attaining the age of twenty-one years; and "the petitioner prays that upon executing a new bond with sufficient sureties in the sum of \$——, he and his surety may be released and discharged from the above mentioned bond of \$2,500, and that an order to that effect may be entered."

Mills & Bridge, for petitioner, cite section 2821 of the Code.

COFFIN, S.—It is not discovered that the section of the Code cited by counsel has any bearing upon the power of the surrogate to make the desired order. It simply relates to the power to *appoint* a guardian, while the prayer of the petitioner is for an order to substitute a new bond (say \$400) for one of a larger amount, filed on obtaining the letters, in the first instance, by the guardian already appointed.

By sections 2597, 2598, etc., of the Code, provision is made for the increase of the penalty of the bond of an executor, administrator or guardian, but none is found relating to the reduction of the penalty. It is claimed, however, that if the court has power to increase, it has power to diminish. But the first, as is seen, is given by statute, while none is conferred as to the latter. Nor can any good reason be assigned why the amount of the penalty of a bond, based upon ascertained facts as to the value of an estate, should be reduced. The fact that the estate or fund has been diminished by unavoidable losses, by the payment of debts or legacies, or payments on account of distributive shares, or other like causes, furnishes no ground for such reduction. To the extent of such losses and payments the liability on the bond would be diminished, and there would be

no reason to ask it. Were such power, as is here asked to be exercised, assumed by this court, probably similar applications would be very frequent and numerous.

The reason for this application, it is understood, is not for the benefit of the ward, but of the guardian. He has to pay the Fidelity & Casualty Company, which is his surety, its charge for acting as such on the bond originally given. This does not concern the ward, for, as held by me in the case of *Jenkins v. Shaffer*, 6 Dem. 59, 19 N. Y. St. Rep. 900, the expense is personal to the guardian, and is not a proper item of charge against the ward's estate. If this be so, and the guardian is unwilling to incur the expense, he should seek relief by resigning or in such other mode as he may be advised.

The prayer of the application is denied.

**In the Matter of the Judicial Settlement of the Accounts of the
Executors of WILLIAM TOBIN, Deceased.**

(Surrogate's Court, Orange County, Filed December 4, 1890.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—JOINT BANK ACCOUNT.

Testator by his will gave his wife \$1,000, and the balance of his estate to his brother. He and his wife had an account in bank in their joint names in which each deposited, having independent sources of revenue, and the larger portion of the drafts upon it was made by the wife. Shortly after his death she drew out the balance. *Held*, that there being no proof as to how much belonged to each, the presumption was that each owned half; that the wife held as trustee any part of such balance as belonged to the estate; that the court had no power to direct her to pay the same over, but would direct that the same be charged against her statutory allowance, the legacy having been paid, and that the executors pay the same to the brother.

Testator William Tobin died May 26, 1889. At the time of his death there was in the Newburgh Savings Bank an open account in the names of "William and Catherine Tobin,"

amounting to \$402.41. Catherine Tobin was the wife of William Tobin. Both had independent sources of revenue sufficient to account for the half or the whole of the account. William was a soldier in the employ of the government and was stationed at West Point. Catherine at the time of her marriage was keeping, and after that continued to keep, a saloon at Highland Falls. The bank officer testified that previous to William's death all the drafts upon the account, twelve in number, had been made by Catherine, except two. The amount drawn out by William was \$500, and the amount drawn by Catherine was \$2,333.32. The account began in 1873. Three days after William's death Catherine drew out the balance of the account, \$402.41. By his will the testator gave to his wife \$1,000 "out of my personal property of money in bank or otherwise," and gave his brother, James Tobin, "all of the balance of my money in bank or otherwise."

The legacy to the wife is not mentioned to be in lieu of any right given her by law as widow. The will is dated December 1, 1888.

W. C. Anthony, for executors; A. H. F. Seeger, for Catherine Tobin; J. G. Graham, Jr., for James Tobin.

COLEMAN, S.—Objection is made upon this accounting by James Tobin, that the executors have failed to account for any part of the bank account, and urge that their account should be surcharged with the amount of the testator's interest in the account, or that such amount be deducted on this accounting from the amount of the legacy to Catherine Tobin, for which they ask to be credited, or from any other moneys she may be entitled to from this estate.

The will disposes of the testator's whole personal estate; she, therefore, takes no distributive interest as widow, R. S. 2565, sec. 75, 8th ed., notwithstanding the fact that the legacy to her is not mentioned to be in lieu of her legal rights. She is, however, entitled to receive the \$150 given her by statute, Sheldon

v. Bliss, 8 N. Y. 31; Vedder v. Saxton, 46 Barb. 188, which appears not to have been paid to her.

As to the bank account, there is no testimony showing how much of the account belonged to each, and the presumption is that at least one-half of it belonged to the husband. *Gelster v. Syracuse Savings Bank*, Gen. Term, 4th Dep., 17 Wk. Dig. 137.

Catherine had the legal right to draw the money from the bank, and she holds, as trustee, any part of it which belongs to the estate of the deceased. *Mulcahey v. Emigrant Industrial Savings Bank*, 89 N. Y. 435; *Gaffney v. Pub. Adm'r*, 4 Dem. 223.

The proceeding is for a judicial settlement, and in it the rights of the legatees under the will must be determined by this court, which has jurisdiction to settle and adjust the conflicting rights and interests in and to the fund held, or which ought to be held, by the executors for distribution. *Riggs v. Cragg*, 89 N. Y. 479, 491.

In the case of *Rogers v. Murdock*, 45 Hun, 33, 9 N. Y. St. Rep. 660, it was held that the surrogate, on a judicial settlement, could charge an executor with the amount due upon certain notes made by a legatee to the testator, and deduct this amount from the amount of the legacy, although the executor could not have maintained an action upon the notes, more than six years having elapsed between the making of the notes and the death of the testator.

James Tobin and Catherine Tobin are both parties to this proceeding, and I am of opinion that this court should, so far as it has power to do so, settle their respective rights in the estate, including the bank account. The only money still unpaid Catherine Tobin is the \$150 mentioned. At least this amount should be charged against the executors as part of the half of the bank account held by Catherine Tobin in trust for this estate, and the amount thus charged against the executors, be by them paid to James Tobin, as residuary legatee, and Catherine's claim thereto thereby extinguished. As to any further interest the said deceased had in said bank account, this

court has no power to make a decree directing Catherine Tobin to pay over. Although the executors have not collected from Catherine Tobin the interest of the deceased in the bank account, and have paid to her the legacy of \$1,000, without retaining such interest therefrom, still I do not think the evidence in the case sufficient to charge them personally therefor. But the decree should provide that the executors shall execute an assignment to James Tobin of all such interest to be held by him to his own use.

In the Matter of the Estate of JAMES TAGGART, Deceased.

(Surrogate's Court, Orange County, Filed September 11, 1891.)

1. EXECUTORS AND ADMINISTRATORS—ADMINISTRATION.

Administration cannot be granted where the deceased left a document purporting to be a will until the question of the validity of the will has been disposed of, notwithstanding the declared purpose of the next of kin not to offer it for probate.

2. SAME—PROOF OF WILL TO AVOID ADMINISTRATION.

No obligation rests on the next of kin to bring the will to probate in order to avoid administration being taken, but a creditor of deceased who seeks letters of administration may, if he so desires, bring proceedings for probate to determine the validity of such will.

Application for letters of administration by a creditor of deceased, who died November 29, 1890. From statement of counsel it appears that on the 31st day of August, 1883, the deceased executed a will, but subsequently transferred all his property, so that, apparently, no property remains to pass by the will. The petitioner, desiring to attach the transfer, asks for the appointment of a representative of the estate, so that he may bring suit for that purpose.

E. A. Brewster, for James Wrigley, creditor; W. D. Dickey, for next of kin.

COLEMAN, S.—Petitioner in this case applies for letters by administration as a creditor of the deceased, to which application the next of kin object, alleging that the deceased did not die intestate, and produce and file with their answer a document purporting to be the last will and testament of the deceased, and ask that these proceedings be dismissed.

The petitioner, however, urges that the proceedings should not be dismissed until it is made to appear that a will has been admitted to probate, and that only an adjournment can be properly applied for by the next of kin, to give them time in which to prove the will, and that failing to so apply, and having stated in open court that they do not intend to offer the will for probate, letters should now be granted as prayed for.

After reflection, I conclude that, it having been shown to this court that the deceased left a document purporting to be a will, administration cannot be granted until the question of the validity of the will has been disposed of, notwithstanding the declared purpose not to offer it for probate.

That no obligation rests upon the next of kin to bring the will to probate in order to avoid administration being taken upon the estate.

That the will cannot properly be probated in these proceedings.

And that the petitioner may, if he so desires, bring proceedings for the probate of the will, sec. 2614, Code of Civ. Pro., and an adjournment, if it is desired, will be made of these proceedings for that purpose; otherwise these proceedings will be dismissed, with twenty-five dollars costs and disbursements, to be taxed, to be paid to the petitioner from the estate by any executor or administrator hereafter appointed.

In the Matter of Proving the Last Will, etc., of LORENZA M.
SHELDON, Deceased.

(*Surrogate's Court, Madison County, Filed September 23, 1891.*)

1. WILL—PROOF—LEGACY TO DRAFTSMAN.

Where a testator has that mental and physical vigor which is essential to make a valid will, it is not the law that the draughtsman of a will, even if he holds confidential relations to the testator, cannot be his executor or take a legacy thereunder, nor can fraud be presumed where the will contains such provisions, nor evidence be required to show that it was made freely, without fraud or undue influence.

2. SAME—UNDUE INFLUENCE—CONFIDENTIAL RELATIONS.

A mere agency to transact business in relation to investments in another State, where the principal takes little or no part in its management, does not create business relations of that confidential character from which will ordinarily arise any legal presumption of undue influence in the making and execution of a will drawn by the agent and containing a legacy to himself.

3. SAME—EVIDENCE.

On probate of a will, it need not be shown that the testator gave directions for making it, or that it was read to or by him. Knowledge of its contents will be presumed from his having signed it, and his declaration that it is his will.

4. SAME.

Testatrix, who had no ancestors or descendants surviving, by her will, gave to certain nephews and nieces, with whom she had little communication, legacies of \$500 and over, and the balance of her estate to a nephew who drew her will, his adopted son and grand-nephews and grand-nieces, children of a niece, share and share alike. *Held*, that the inequality of the legacies did not show undue influence, and that the will should be admitted to probate.

Probate of will.

Joseph Mason and John E. Smith, for proponent; Hopkins & Aldrich, of Aurora, Ill., and James S. Sherman, for contestant.

KENNEDY, S.—The testatrix was a resident of Brookfield, in this county. The will was executed at the house of her nephew,

Truman H. Day, at Aurora, Ill., she at that time being on a visit to him at that place. She left property valued at nearly \$40,000, substantially all of which was represented by securities in the hands of said Day, who, for fifteen years previous to her death, had acted as agent in making investments for her, rendering annual statements to her and remitting such sums as she desired for her personal use. The will was executed on the 19th day of October, 1886, and the testatrix died on the 24th day of December, 1890, at the age of eighty-four years. At the time the will was executed she was in the enjoyment of her usual health, and so continued until a short time before her death. She was a woman of ordinary intelligence, had a clear understanding of her business affairs, and had the legal capacity to make a will and dispose of her property with a thorough knowledge of its amount and character and of her relation to those who would have been her heirs if she had died intestate. Her husband was dead, and her only heirs and next of kin were a sister and a number of nephews and nieces. By her will, after providing for her funeral expenses, she gave legacies to various nephews and nieces, none less than \$500, amounting in all to the sum of \$14,000. After which she gave her residuary estate of \$21,000 to said Day, his adopted child, and eight grand nephews and nieces, children of her niece, Sarah H. Jones, share and share alike.

All the formalities which the law requires were observed in the execution of the will, but its validity and proper execution are challenged by Solumnus D. Seaman, one of her nephews, residing at Aurora, Ill., on the ground of Mrs. Sheldon's alleged incapacity to make it; and also on account of the alleged fraud and undue influence of said Day in the preparation and execution of the will. On the trial there was no evidence from which the lack of testamentary capacity could be inferred, nor any affirmative evidence of undue influence; but notwithstanding this, the contestant insists, because it appears from the evidence the will was drawn by Mr. Day while she was at his house, and he was made an executor of, and a legatee under the will, and

further, that for many years he had acted as her agent in the management of her estate in Illinois, that the will was the product of fraud and undue influence on his part.

The contestant claims that, under such circumstances, the proponent must give other than the usual evidence of the witnesses to the will, before it can be admitted to probate; that it must be shown the testatrix gave directions for its drafting, which were obeyed, or that it was read to or by her before its execution, and bases this proposition of law upon the ground that where the writer of a will has confidential relations with the testator, and the will makes him an executor or legatee thereof, such a presumption of fraud and undue influence arises that the ordinary proof of the execution of a will thus made does not rebut or outweigh such legal presumption; that the proponent must show, in addition thereto, that the will was made freely, without fraud and undue influence, and that the proponent should establish by affirmative evidence that none of the provisions of the will were dictated, suggested or brought about by his instigation.

The rule of law which the contestant invokes applies only to that class of cases where by reason of sickness, old age, mental and physical condition or other circumstances, the testator had not that health, intellectual vigor, independence of character, freedom of action and judgment to guard his rights and protect himself and his estate from the stealthy tread of those who would illegally take what he had designed for others. We shall hold that where a testator has that mental and physical vigor which is essential to make a valid will, it is not the law that the drawer of a will, even if he holds confidential relations to the testator, cannot be his executor or take a legacy thereunder; nor is it the law that if the attorney, physician or priest of the testator draw a will in which there is a legacy to himself, that such will or such legacy is presumed to be fraudulent, nor in such a case is fraud presumed in aid of those who seek to overthrow the will; nor does this fact, in the absence of evidence, warrant the presumption that the testatrix was unduly influenced, or was

improperly or fraudulently controlled in making her will. All that can be legally claimed for such a state of facts is that it may or may not be a suspicious circumstance; but whether it is or not depends upon the facts of each case.

The fact that a beneficiary is the attorney, guardian or trustee of a decedent does not of itself alone create a presumption against a testamentary gift; neither is it presumed to have been procured by fraud and undue influence in every case and under all circumstances; nor does that single fact call upon courts to pronounce against a will thus executed unless additional evidence is produced to prove knowledge of its contents by the deceased. It is only in that class of cases where the testator excludes the natural objects of his bounty that a will in favor of his attorney, physician, priest, is looked upon by courts with suspicion. To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence can be inferred. It is not sufficient that the party benefited by a will had the motive to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not really the will of the testator. If a contestant alleges fraud and undue influence, or any other defense, it is his duty to prove it, because fraud is never presumed from the existence of an opportunity to commit it. It must be established by such evidence that the influence of wrong doing follows as a natural and unavoidable result, and it is only so established when such facts are proven that no other legitimate conclusion can be drawn. Justice to testators, heirs and legatees does not demand such a rule of law as the contestant seeks to maintain, nor is there any necessity for its existence. If such were the law, testators would, many times, be debarred the aid of an attorney, relative or other person in whom they had the most implicit confidence, and whose legal ability, knowledge of the testator's affairs, or other circumstances made it especially necessary to have such person draw the will, provided he desired to

remunerate him for services rendered or to be rendered, or for faithfulness to his interest, or from any other proper motive wished to give him a legacy. To say that every lawyer, doctor, minister or other person holding confidential relations with a testator, who draws a will with a legacy to himself, is, from that simple fact alone, presumptively dishonest, his motives and his acts presumptively fraudulent and wicked, and the will presumptively the product of undue influence, is to assert a proposition of law which is not now, never has been, and probably never will be the law of this State.

The thief, the burglar and the assassin is each presumed to be innocent until the court, upon legal evidence, and after a fair and impartial trial, has imposed the sentence which the law demands for his crime. But, if the law is as the contestant claims, a reputable citizen known far and wide for his ability and unquestioned moral character happens to be on confidential terms with a testator, who clearly and thoroughly understands his own business, and appreciates his duty to others, draws a will for him, he is denied the legal rights given to every criminal, and must prove that he is not guilty of any wrongdoing or fraud, and undue influence, before there is any evidence that he has violated any law whatever or done injustice to any one. The law presumes every person to be of good character, and he is not to be deprived of the benefit of this legal presumption because he happens to be an attorney, physician, minister, confidential friend, adviser or business manager, and draws a will with a legacy to himself, which a competent testator knowingly, deliberately, intentionally, voluntarily gives to him; nor under such circumstances ought he to be compelled to go into court and by witnesses establish the fact that he is not a scoundrel, when there is not the slightest proof that he has done a wrongful act towards the testator, or any one interested in his estate. The presumption which the court is asked to recognize makes no allowance for the character of men who draw such wills; all are alike condemned, irrespective of their known integrity, their prominence in social or business affairs, their private or pro-

fessional standing; makes no allowance for the age, mental and physical condition of the testator, the amount of his property, the nature of the relations existing between him and his heirs, the financial condition of his relatives, their good or bad character; makes no allowance for the fact that if the beneficiary writing such a will is a near relative who would take a considerable share of the estate if there were no will, the same presumption which might arise against a stranger is not applicable to him. Courts do not thus quickly, easily and unnecessarily rob the drawer of a will of his good name and fame because somebody alleges or imagines his confidential relations with the testator were influential in obtaining a legacy to himself. The dead are not here to explain their motives or their acts, and the law in this State, under some circumstances, prevents the legatee and writer of the will from disproving the insinuations of the accuser by his own evidence. Under such circumstances it is better, more in accordance with the procedure of courts in other judicial proceedings, to wait and hear the evidence before rendering judgment.

If the draughtsmen of wills could choose their own time and occasion, had opportunity, and it were possible to surround themselves with witnesses who would be sure not to die until the will was offered for probate, such a presumption of law upon the proof of wills might be harmless; but in view of the fact that this cannot be done, it would seem but fair and just to those who draw wills of competent testators, with legacies to themselves, if they are persons of good character, to presume they have discharged their duties toward the testator, his heirs or legatees, fairly and honestly, and are not presumptively guilty of fraud and undue influence.

“Though in the trade of war I have slain men,
Yet do I hold it very stuff o’ the conscience
To do no contrived murder. I lack iniquity,
Sometimes, to do me service.”

Perhaps the suggestions we have made are unnecessary, for the reason that the legal presumption which the contestant urges

applies only to cases of contracts and gifts *inter vivos*, and does not apply in all its strictness to wills. The distinction between the rule affecting testamentary gifts and gifts *inter vivos* and contracts is well settled by American and English courts, and the law held to be that a will is not invalidated by the mere fact that it was written by the attorney, agent, physician, priest or other confidential adviser of the testator, who is himself a beneficiary. It is in courts of equity alone that if a gift or contract is made in favor of him who holds a position of influence that courts cast upon him the burden of proving that the transaction was freely conducted, as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. But in case of a legacy under a will, to cast upon the legatee, by reason of the relations he sustains to the testator, the burden of showing how the matter came about, and under what influence or with what motives the legacy was made, what advice the testator had, or by whom given, in many, if not in most cases, could not possibly be discharged. The natural influence of a person holding confidential relations with another may be lawfully exerted in his behalf to obtain a will or legacy, provided the testator thoroughly understands what he is doing and he is a free agent, and the volition of the testator, though biased and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

Again, there is no presumption of fraud and undue influence, because there were no such confidential business or social relations existing between Mr. Day and the testatrix as the law recognizes as having a wrongful or controlling influence upon testators. Mrs. Sheldon sometimes went to visit him, and he some years came east to visit her and other relatives. She had never lived with him, her home was with her niece in this State, so that she saw him seldom and only for short times; for these reasons the opportunity for that constant and intimate association, that silent but effective influence which sometimes operates

upon the mind of a testator, did not exist. The only pretense that there were any confidential relations between them which might possibly be the basis of improper influence arises from the fact that Mr. Day had charge of her investments in Illinois, and paid to her such portions of the income as she desired.

——— "What drugs, what charms,
What conjuration, and what mighty magic"

the contestant claims Mr. Day made use of does not appear either from the evidence or the argument of his counsel other than from the facts above stated. To be the agent of another in some distant State for such a purpose does not of itself create those confidential relations which are influential in testamentary dispositions of property. It might with as much propriety be said that the directors of a savings bank, which receives and invests the money of its depositors, sustain such confidential relations to them that if a director drew a will for one of them with a legacy to himself, this fact alone would be presumptive evidence of undue influence and would require more than the statutory proof to admit the will to probate. A person who has legal business must ordinarily, and sometimes of necessity, employ an attorney, a person may be sick or injured and require the services of a physician or surgeon, in both of which cases there must of course exist relations of confidence and dependence which do not arise when one is simply the agent of another in regard to financial investments or business operations. In the one case the employer is wholly dependent upon the ability, advice and good judgment of his physician or attorney, while in the other the agent must conform to the wishes and judgment of his principal. In one case the relation is a matter of necessity; in the other it is a voluntary matter. A mere agency to transact business where the principal takes little or no part in its management and which from its nature does not require intimate and confidential relations for its performance, would not be likely to be the origin of, or be productive of, that fraud and undue influence which the law condemns in the making of

wills; hence, we shall hold that the business relations existing between Mr. Day and the testatrix were not of that confidential character from which would ordinarily arise any legal presumption of undue influence in the making and execution of Mrs. Sheldon's will. But if it were admitted his business relations were confidential, so is that which an attorney sustains toward his client, yet one's own lawyer has always been considered the most proper person to write his will, and it is regarded as an unfavorable circumstance when he is passed by and another person employed for that purpose, and a like reason would seem to make it extremely wise and proper and legal for Mr. Day to draw the will in question.

But the contestant also claims that the proof of the will and its execution were insufficient to admit it to probate, for the reason that it was not shown that the testatrix gave directions for making the will, or that it was read to or by her before its execution. If this were sound law, the legislature of this State should be called together at once for the purpose of passing some statute by which such evidence could be perpetrated when once a will has been executed. If such be the law, a large proportion of the wills now in existence could not be admitted to probate, because the person who drew the will, or those who may have been present at its execution, or knew of the facts which the contestant insists must be proven in order to probate a will, might be dead or absent, or incompetent for many reasons to testify; in a word, the proof suggested could not be obtained. Such a law would compel a testator to provide some legal machinery, by which, at the proper time, it might be made to appear to the surrogate that he knew the contents of the will at the time of its execution even if no objections were filed against it, because the surrogate must be satisfied that a testator knows the contents of his will before it can be probated. But in order to avoid the objection that the testator is not shown to have knowledge of the contents of his will, the law presumes that he is of perfect mind and memory; that he had legal capacity to make a will; that he had knowledge of, and assented to, all of its pro-

visions; that all the facts necessary to its validity existed at the time it was made; that its execution was valid, if the legal formalities are apparent upon the face of the instrument, or are proven before the surrogate; that in all respects it was designed, prepared and executed according to law.

The signature of a testator to his will ought to be and is regarded by the courts as evidence that it is his deliberate act, and that he would not have placed his name to an instrument which does not express his testamentary intention, and from this fact alone he is presumed to have known its contents, to have understandingly executed the same, and been aware of the legal effect thereof. By means of this legal presumption courts are enabled to admit wills to probate, thereby protecting the rights of heirs and legatees, and distributing the estate as the testator requested, which otherwise could not be done because of the inability of parties interested to prove, by living witnesses, or circumstances, that the testator knew anything about the contents of his will. Civilization makes legal presumptions necessary in courts to establish a fact, and in a proper case they are as satisfactory evidence as if witnesses had testified to the same.

In this case the witnesses to the will found the testatrix at her nephew's house with the will drawn and in her hands and ready for its execution; it was then signed by the deceased in their presence, and attested by them in her presence. It was spoken of by her as her will, and such she declared it to be, and it can hardly be supposed that a person of her intelligence and good health at that time would have executed a paper without knowing its contents, so that it may safely and legally be inferred that she was acquainted with the contents of the paper she signed. More than this, she had sent for these particular persons for witnesses to her will because they were old acquaintances and she preferred them to strangers, and so told them. This fact would indicate that she knew the contents of her will, and thoroughly understood what she was about to do, for the courts have held it to be a wise precaution, and a very proper

thing to do, for a testator to invite his old and intimate acquaintances to witness the execution of his will.

But while the law indulges in the legal presumptions to which we have referred, the absence of incapacity, of fraud and undue influence are very apparent from the provisions of the will, its manner of execution and the relation of the testatrix to the legatees.

As she had no children, and her blood flowed in the veins of no descendants, she was under no legal or moral obligation to consider her relatives entitled to her bounty. Being of sound mind, she had the undoubted right to dispose of her estate by will to whomsoever she chose. Her kinsmen had no vested rights therein and no interests to be protected by her. It is natural and reasonable that the property of a father or mother should go by will or law to their children or descendants. The fact that the legislature of this State has arbitrarily said that the property of an intestate having no living ancestor, children or descendants, shall go to collateral relatives, did not compel the testatrix to recognize them as having an expectant right to her property which she was in duty bound to take into consideration in disposing of her estate. As she had been under no legal obligations to support them while living, she was under no moral coercion or duty to provide for them after her death. She therefore had the right to use her own judgment, consult her own preferences without regard to whether such disposition of her property as she might make would be approved or disapproved by others. The natural objects of a testator's bounty are not always those whom the statute declares shall take the property of an intestate, but may depend upon the life they have lived; their habits, character, associations, their relations to, or association with the decedent, their wealth or their poverty, their success in business or their lack of it; their family and other social relations, their nearness to or remoteness from the testator's residence, and various other circumstances which might naturally and properly cause a testator to make, apparently, an unequal distribution of his estate. Some one who

has acted the part of a dutiful son or daughter, or friend, may naturally, reasonably, justly be the natural object of a testator's bounty in preference to relatives. The lengthening and weakening ties of blood may be severed by time, by the birth and growth of affections which seek another channel for their possession and enjoyment, or by other causes. The structures which human hearts may rear in early life will sometimes go to decay and be abandoned for castles which other hearts may build, and the stepping stones to which, though unseen by the passer by, may echo a welcome tread to listening ears and waiting hands within.

It may be very plausibly argued that inequality of legacies among collateral heirs equally related is no evidence of fraud and undue influence in making a will; that a testator without ancestors or descendants living is not obliged to inventory his assets and carefully take into serious and thoughtful consideration the number of his distant relatives and weigh with nice precision the extent of the pleasure or benefits he has received from each, or the quantity of affection or gratitude each has shown him; that as against such relatives he has the right to indulge in such regard, such prejudices or caprices, such likes or dislikes, as he sees fit to entertain; that he may consider any one, or all, or none at all, entitled to his property; that he may give to, or withhold from, them because of any motive or reason he may permit to influence him, without being legally subjected to the charge of incompetency, or of being unduly influenced, or of being required to apologize or explain to any one; that while such relatives have the legal, they have not the meritorious, standing in courts which entitle their pretended claims against a testator's will to the same critical and favorable consideration as if they were the children or descendants of the deceased, or were persons with whom he may have lived for many years; on whom he may have been dependent in sickness and health, and for whom he would be under those obligations which affection, gratitude, considerate helpfulness and intimate daily associations ordinarily bring into existence; so that in this case it

seems entirely natural and reasonable that Mrs. Sheldon should give the larger portion of her residuary estate to her eight grand-nephews and nieces, many or all of whom had been born beneath her own roof, been her constant companions from babyhood to manhood and womanhood, in whose happiness and prospects in life she must have taken a more than kindly, a motherly interest, whose daily lives with their joys and sorrows, their tears and laughter, must have been a part of her own existence, coupled to and inseparable from it, that those with whom she had so long lived, and by whom she expected to be watched and tended when

“Age sat with decent grace upon her visage
And worthily became her silver locks,”

and the dawn of another life was breaking over her horizon; that those by whose hands she expected to be buried, where the rising and the setting sun might cast its lights and its shadows alike, and at the same time upon her grave and the home and children she had loved; that such as these should be the natural objects of her larger and more liberal bounty, rather than to others, whose devotion to her interests, her comforts, her happiness and the performance of all those kindly offices so dear to the aged, she had never observed.

So, too, it was natural and reasonable that she should devote a large sum to provide a burial place and monument for herself and for her niece, with whom she had long made her home. Both of these legacies are of a character and amount, \$6,000 in all, which she alone, and not Mr. Day, would be likely to suggest, and in which she would ordinarily take a deep interest at her time of life. They are such as would not be put into her will if she had been under his control, ready at all times to do his bidding and yield to selfish and miserly suggestions from him in order that he might receive a larger portion of her property. Wiser than many who rely upon affection or friendship not to leave their graves unmonumented and unremembered;

knowing that wealth descended or devised is sometimes parsimonious of its gifts to the dead; aware that forgetfulness and oblivion often come quickly to the departed; with a judgment which made no mistake, she provided the means and directed that to be done which should make her name as enduring as the marble or the granite whereon it should be written; although it might vanish from the memory of the living, thereby taking away all discretion which her executor might otherwise have as to the amount which should be devoted to burial purposes. This provision would seem to have been designed by one who, if fraud was attempted, disregarded it; if undue influence was exerted, overcame it; if greed and selfishness sought to give shape to this testamentary bequest they were powerless and harmless, thus leaving her in full possession of that judgment, that freedom and independence which testamentary capacity requires.

The absence of wrongdoing is also shown by the fact that if Mrs. Sheldon had died intestate, Mr. Day's share of her estate would have been \$10,000, whereas by the will it is only \$3,200, nearly seven thousand less than he would have had if there had been no will. If the testatrix was wholly under his control, willing to subscribe to any will which Mr. Day might impose on her, provided he was scheming and contriving to get as much of her property as possible, and had such influence over her that she would yield to any suggestion of his, it seems extremely probable that he would have so drawn the will as to increase, rather than diminish, the amount he would have had if there had been no will, or would have drawn such provisions that the larger portion of the estate would have fallen to him. All that was done seems to have been to his disadvantage, and if he made use of fraud and undue influence to procure the will, he was not sufficiently shrewd to be a gainer by his own wrong.

Her legacies to the contestant, his brother and sister, of \$500 each, do not seem to be the result of anything save the ordinary reasons and influences which make discriminations among relatives of an equal degree. One nephew and niece live in Cali-

fornia, the other in Aurora, Illinois, and the evidence does not disclose that they ever wrote to her or she to them, or that either nephew ever visited her but once in this State, nor does it appear that they or the niece ever called upon her when at Aurora, or ever showed her the slightest attention whatever. It does not appear that either of them ever aided her in accumulating or caring for her property, or in any way assisted her or associated with her in such manner that she would be likely to have the same degree of attachment for them that she had for Mrs. Jones and her children, with whom she had lived so long and expected to live thereafter. And so of Mr. Day. For fifteen years he had acted as her agent in managing her property; there were almost yearly visits between them, and she undoubtedly felt that for his care of her estate, and his success in largely increasing it, over and above her support, he was entitled not only to a considerable remuneration for his services and his faithfulness to her interests, but to a larger share of her residuary estate than the Seaman heirs, to whom she was not under the slightest obligations for anything they are shown to have done for her either in a business way or socially. It is not improbable, but quite possible, that this lack of recognition of their old aunt, either by letters, or visiting or otherwise, if such was the fact, may have led her to think that while she remembered them in her will, the legacies were quite commensurate with any services they had rendered, or any attention they had shown her, and that for these reasons they were not entitled to share equally with those who nearly all their lives had contributed their services and their society to her, and made their days and years subordinate to her claims upon them for all that her age, her health, her comfort, her needs and her happiness required. Thick waters show no images of things, and it may be when she thought of disposing of her property, she saw not her image and superscription reflected upon one of the ancestral streams.

Nothing would seem more natural or business like, than for Mrs. Sheldon to have Mr. Day draw her will, as he was familiar with her property, had transacted her business, and knew her

relations with all her heirs. It would have been unnatural and contrary to the ordinary manner of doing such business that she should have gone to a stranger under such circumstances to have her will drawn. It is sometimes regarded as evidence of incapacity, and sometimes that fraud and undue influence exist, when a testator abandons those in whom they have always had the utmost confidence in the transaction of their legal and other business, and seek among strangers for that advice and assistance which is sometimes required in drafting wills. For the same reasons it was proper she should name Mr. Day as the executor of her will.

A decree will be entered admitting the will of Lorenza M. Sheldon to probate.

(Note.—Surrogate's decision affirmed by General Term without opinion, 65 Hun, 623; affirmed by Court of Appeals without opinion, 141 N. Y. 559; 57 St. Rep. 866.)

In re WOOD'S ESTATE.

(Surrogate's Court, New York County, October 28, 1891.)

1. ADMINISTRATION C. T. A.—LEGATEES.

As legatees are, under Code Civ. Pro. section 2643, subd. 2, each entitled to apply for letters c. t. a. without citing the others, an application by a legatee to revoke such letters granted to another legatee will be denied, when the surrogate who granted such letters did not, in his discretion, deem it advisable to have everybody interested in the estate notified of the application.

2. SAME—WHEN MALES PREFERRED.

Other things being equal, the court, in a case where there are opposing claims, will issue letters c. t. a. to a male in preference to a female, although the preference of males to females in case of intestacy 4 Rev. Stat. 8th ed. p. 2552) was as to administration c. t. a., abolished by the enactment of Code Civ. Pro. section 2643, substituted for 3 Rev. Stat. (6th ed.) p. 74, providing for the issuance of letters with like restrictions as in cases of intestacy.

3. SAME—WHO IS A LEGATEE.

One is a legatee entitled to apply for administration c. t. a. (Code Civ. Pro. section 2643), although not named in the will as a legatee, when she was entitled as an heir of a legatee named in the will to a share in the fund thereby bequeathed.

Proceedings by Joseph S. Wood to revoke letters of administration c. t. a. of Samuel Wood, deceased, issued to Jennie E. Wood, and that same be issued to applicant, on the ground that he was named as a legatee in the will, but that she was not expressly named as a legatee, although she took an interest under the will. Both parties claimed under subdivision 1 of paragraph 2 of the will, which was as follows: "I hereby direct and require my executors to set apart out of my estate * * * \$15,000, to pay the income thereof semi-annually to my cousin Stephen Wood, during his natural life, and, after his decease, then to pay the income of said \$15,000 to the children of said Stephen Wood who shall be living at the time of his death, and to the issue of such of them as shall be dead, as follows: The income of \$5,000 to each of his sons, Martin and Joseph Wood, and the income of \$2,500 to each of his daughters, Elizabeth Jones * * * and Mary Baldwin, * * * during the natural life of his son, said Joseph Wood; and, on the death of the said Joseph Wood, I give and bequeath the said principal sum of \$15,000 as follows: \$5,000 to said Martin Wood and his heirs, \$5,000 thereof to the heirs of said Joseph Wood, \$2,500 thereof to the said Elizabeth Wood and her heirs, and \$2,500 thereof to said Mary Baldwin and her heirs. But, if either of the above named shall die without lawful issue before the death of the said Joseph, then the share of such deceased legatee shall be equally divided among such of the children of Stephen Wood as shall survive, and their lawful issue, *per stirpes*."

Petitioner was Joseph Wood, who was described in the will as the son of Stephen Wood. Martin Wood, also named in the will, had died, and Jennie E. Wood, his daughter, who thereupon became entitled to share in the income bequeathed to him

during the life of Joseph Wood, and who was entitled to share in the principal upon the latter's death, and who was likewise entitled to share in the principal sum bequeathed to Mary Baldwin if the latter died before Joseph Wood, claimed that she was a legatee under the will, although her name did not appear as such therein.

Treadwell & Catlin, for applicant; Magner & Hughes, for respondent.

RANSOM, S.—Application to revoke letters of administration c. t. a. upon the ground that petitioner has a right to the letters prior to that of the respondent, and that they were issued to the latter without notice to the former. The question is, has petitioner such prior right? Section 14, pt. 2, ch. 6, tit. 2, art. 1, 3 Rev. Stat. (6th ed.) p. 74, for which section 2643 of the Code of Civil Procedure was substituted, provided for the issuance of letters of administration c. t. a. first to legatees, "then to the widow and next of kin of the testator, or to any creditor of the testator, in the same manner and under the like regulations and restrictions as letters of administration in case of intestacy." Among those restrictions and regulations is that which prefers males to females in case of intestacy, and is contained in section 28, art. 2, tit. 2, ch. 6, pt. 2, of the Revised Statutes. 3 Rev. St. (6th ed.) p. 78; 3 Rev. St. (8th ed.) p. 2552; *Cottle v. Vanderheyden*, 11 Abb. Pr. (N. S.) 19. This section is still in force. Section 14 of the Revised Statutes was repealed by chapter 245 of the Laws of 1880, and section 2643 of the Code of Civil Procedure enacted in its stead. This section of the Code establishes the order of priority in which parties are entitled to letters of administration c. t. a., and makes no discrimination between males and females. The order is: First, to one or more of the residuary legatees who are qualified to act as administrators; second, if there is no such residuary legatee, or none who will accept, then to one or more of the principal or specific legatees so qualified, etc. Each of the parties to this

proceeding is a legatee under subdivision 1, par. 2, of the will of the testator; both being recipients of the income of trusts, and the respondent being also entitled to share, in a certain event, in the funds held in trust for the petitioner and Mary Baldwin, respectively. *In re Wood's Estate*, Surr. Dec. 1889; p. 120; *In re Wood*, 5 Dem. Sur. 348; *In re Roux*, Id. 523; *Estate of Thompson*, 33 Barb. 334, affirmed 28 How. Pr. 58. They are both legatees, within the second subdivision of section 2643, and each was at liberty to apply for letters without citing the other. Section 2644, Code Civ. Pro. Had he deemed it advisable, the surrogate could, in his discretion, have required everybody interested in the estate to be notified of the application. Section 2643, Id. He did not do so in the present case, and the petitioner can have no ground of complaint for the omission. If the petitioner had been a party to the proceeding in which the letters were issued, it would have been within the discretion of the court to grant them to either or both the parties, as the circumstances would warrant. Other things being equal, the court, in a case where there are opposing claims, would prefer the male to the female in issuing the letters. Application denied.

(Note.—Affirmed by General Term, 53 St. Rep. 804.)

In the Matter of the Judicial Settlement of the Account of
CHRISTOPHER C. CROSBY, Ex'r of Walter Essex, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed November 10, 1891.*)

1. GIFTS CAUSA MORTIS—DELIVERY.

Testator, who had no wife or children, held a note of the executor, who was an intimate friend. During his last illness he asked his niece to bring his papers, and gave her this note, telling her that he had given it to Crosby; that he knew of it, that she was to keep it, and that he did not want his heirs to know anything about it. *Held.*

that this constituted a valid gift *causa mortis* of the note to the executor, and that there was a sufficient delivery.

2. SAME—COLLATERAL INHERITANCE TAX.

The executor received said note subject to the collateral inheritance tax.

3. EXECUTORS AND ADMINISTRATORS—INTEREST.

Where an executor commingles the avails of the estate with his own funds and uses them for his personal benefit, he is chargeable with interest.

Judicial settlement of accounts.

C. D. Van Aernam, for executor and claimant; N. M. Allen, for contestants.

SPRING, S.—The testator held a note of \$1,000 against the executor which he had owned since 1876.

The executor claims this note as a gift from Mr. Essex, and asserts his title thereto in the inventory filed and does not include it among the assets of decedent in his account rendered in this proceeding.

Objections are presented to the account by the legatees for this omission, and the validity of the alleged gift is thus brought in controversy.

The testator at the time of his death was well along in life, without wife or children, and an intimate friend of the executor, his alleged donee.

His niece, who was the only witness as to the alleged present, had been his housekeeper for several years, and evidently was trusted and appreciated by him, for he made her his beneficiary to the amount of \$1,000.

Mr. Essex was taken with hemorrhage of the lungs in the village of Franklinville, was removed to a hotel and remained there continuously until his death, which occurred in about two months after the first attack.

He realized from the first that his recovery was impossible. He had a farm and three or four thousand dollars in securities.

A day or two after his affliction he directed his niece to bring his papers from the farm, which she did, and kept them, including this note, in her possession, until after his death. Early in his sickness he requested her to get this note against Crosby, and when brought to him took it in his hands and then handed it back to her, telling her he had given this note to Christopher Crosby; that she was to remember this; that he did not wish his heirs or any one else to know of this gift; that Crosby knew about it and that she was to take it and keep it, evidently meaning until his death.

He reiterated to her a few days before his death the statement of this present, and again enjoined upon her to remember it and also to keep it secret.

Two of the essentials necessary to a valid gift of this kind are unmistakably present.

1st. That it was given in view of the donor's death; and 2nd, that he died of the ailment with which he was afflicted at the time the present was made.

Was there a sufficient delivery of the note?

In case of gifts *cause mortis* physical possession of the property is not necessarily parted with by the donor. The right of revocation inheres in the donor in case of recovery, and that is the characteristic distinguishing gifts of this kind from those *inter vivos*. Williams v. Guile, 117 N. Y. 343-348, 27 St. Rep. 253.

The note in controversy was especially designated by the donor. His intention to make the gift is established by clear, unequivocal testimony, and his direction to his attendant to retain the custody of the note during his lifetime, and his evident care that his executor, the donee, should be assured in its possession upon his death, are amply adequate to make a sufficient delivery and constitute the custodian of the note his agent to render effectual the donation. Grymes v. Hone, 49 N. Y. 17; Williams v. Guile, 117 id. 343, 27 St. Rep. 253; Hathaway v. Payne, 34 N. Y. 92.

In the first case cited the donor made a written assignment of

twenty shares of stock to a granddaughter, and gave the assignment to his wife to give to the donee upon his death. The court, in sustaining this as a valid gift *causa mortis*, held that the wife was the agent of the donor to effectuate the donation.

Testator was desirous that the fact of this gift should not be divulged to his legatees. Evidently he thought to accomplish this by making his donee his executor.

He told his housekeeper that Crosby knew of this gift, and it is fairly inferential that the old gentleman expected in this way to work out the formal delivery of the note without any publicity. That when Crosby obtained the securities he would destroy this note.

In no other way can we spell out his extreme caution, and his designation of Crosby as his executor adds significant force to this inference.

Crosby, however, received this note subject to the collateral inheritance tax. Chap. 713, Laws of 1887, sec. 1.

The executor received the avails of the estate and commingled them with his own funds, and used them for his personal benefit, and is therefore chargeable with interest, which I have adjusted in the statement of the account embodied in the findings herein.

In the Matter of the Estate of JESSE B. SMITH, Deceased.

(*Surrogate's Court, Chautauqua County, Filed December 18, 1891.*)

WILL—CONSTRUCTION—JURISDICTION OF SURROGATE'S COURT.

The Surrogate's Court has not jurisdiction to give judicial construction to wills on petition for letters of administration with will annexed in place of deceased executrix; but the question may be properly decided on judicial settlement of the accounts of such administrator, when appointed.

Proceedings for appointment of administrator with will annexed.

Walter L. Sessions, for petitioner and as special guardian for William Gaynor, minor, legatee; Van Dusen & Martin, for John Gaynor, legatee.

SHERMAN, S.—The petition for the probate of this will alleged that the deceased died at Harmony, Chautauqua County, December 13, 1889, leaving personal property not exceeding in value \$2,500, and real estate not worth over \$4,000. Deceased left no widow, but one niece, Mrs. C. C. Hawley, his only heir at law, and made his will dated November 28, 1889, and appointed said Emeline Gaynor, his housekeeper, sole executrix thereof, which will was duly probated February 3, 1890, and letters testamentary issued to her.

The following are the material portions of such will: "After all my debts are paid in full, I do then give and bequeath unto Emeline Gaynor, of the said town of Harmony, being now my housekeeper, all of my real and personal property of every name and nature that I may have at my decease. One thing amongst the property is hereby mentioned, to wit: the insurance that I have obtained on my life of two thousand dollars, in the Chautauqua Mutual Life Association; that is, two one thousand dollar policies that I now have and hold against said association on my life.

"It is also further understood that in the event of Emeline Gaynor dying before said Jesse B. Smith, then all of the above mentioned property is to go to William Gaynor, the son of Emeline Gaynor. It is also understood that when Emeline Gaynor dies whatever portion of said property that she has inherited from me and remains unspent of my property at her decease shall go to her said son William Gaynor, all except \$500, which shall go to her son John Gaynor.

"Likewise I make, constitute and appoint Emeline Gaynor of the town of Harmony to be my executrix of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof I have hereunto subscribed my name and affixed my seal this 28th day of November, 1889.

"JESSE B. SMITH."

Emeline Gaynor died intestate September 6, 1891, and no administrator has been appointed of her estate. She left her surviving two sons, said William and John Gaynor, by a former husband, her only heirs-at-law.

She, as such executrix of the estate of Jesse B. Smith, deceased, made no inventory of the estate, and has never accounted, and such estate remains unsettled.

On October 5, 1891, John C. Lewis was duly appointed general guardian of the person and property of said William Gaynor, minor, now aged twelve years, and duly qualified. The petition for such appointment alleged the value of the personal property of such minor was about \$500, and annual rents of his real property not over \$125.

The petition for the appointment of said John C. Lewis as administrator with the will annexed of the estate of said Jesse B. Smith was made and filed October 5, 1891. No citation was issued upon such petition, but such general guardian and the petitioner herein and said John Gaynor and William Gaynor by his special guardian, W. L. Sessions, duly appeared personally and by counsel and asked the surrogate to give judicial construction to said will as to whether or not the testator gave all his property, real and personal, to Emeline Gaynor, now deceased, or only the use thereof during her life, and the balance to her said two sons William and John.

No one appeared for the estate of Emeline Gaynor, deceased, no administrator or executor of her estate having been appointed.

The persons so appearing claimed, and it was not denied, that all the debts owing by Jesse B. Smith at his death had been fully paid. I do not think that such claims are conclusive as to creditors, as the executrix had not advertised for claims and had not filed an inventory.

No objection was made to the appointment of John C. Lewis as such administrator, except that the will gave all the property

to said Emeline, and that therefore no such administrator was necessary.

I do not think that the Surrogate Court has jurisdiction to give construction to the will in this proceeding, even by consent and request of all parties interested. To do so would be a mere *brutum fulmen*. That Surrogate Courts have authority to construe wills on the judicial settlement of estates has been often held by the Court of Appeals and Supreme Court as incident to the authority expressly given to settle and make distribution of estates. *Riggs v. Cragg*, 89 N. Y. 479; *Purdy v. Hayt*, 92 id. 446; *Du Bois v. Brown*, 1 Dem. 317; *In re Verplanck*, 91 N. Y. 437; *Matter of Thompson*, 5 Dem. 117.

Section 2624 of the Code gives to Surrogate Courts full jurisdiction to construe wills on probate relating to personal property, and it has been held that sections 2622, 2623, 2627, 2629, 2481, subd. 11, and 2482, give Surrogate Courts authority to construe wills on probate relating to real estate. *Matter of Marcial*, 37 St. Rep. 569-576; *Matter of Look*, 22 id. 86; *aff'd* by Court of Appeals, 125 N. Y. 762, 36 St. Rep. 1010; *Matter of Delaplaine*, 5 Dem. 402, 8 St. Rep. 757.

The authority to appoint administrators with the will annexed by Surrogate Courts is granted by section 2643 of the Code in the several cases therein mentioned, of which this is one provided for, which section says that the surrogate *must*, upon application for such purpose, upon notice to be given to creditors and other persons interested, as the surrogate deems proper, issue letters of administration with the will annexed, as provided in subds. 1, 2, 3, 4 and 5 of such section.

I find no provision in the Code or statutes giving Surrogate Courts authority to construe wills in a proceeding like this, and I see no necessity for it in this case, as such construction can be given upon the final settlement upon service of notice upon all parties interested, including creditors and persons interested in the estate of Emeline Gaynor, deceased.

I, therefore, direct decree refusing to give such construction to the will of Jesse B. Smith, and appointing John C. Lewis

as administrator, with the will annexed, of such estate, without costs to either party in this proceeding at this time, he having duly qualified, reserving questions as to costs to the settlement of the estate.

In the Matter of the Probate of the Will of T. B., Deceased.

(Surrogate's Court, Kings County, Filed January, 1892.)

WILL—PROBATE—LIBELOUS CLAUSE.

A will should not be permitted to be made a vehicle for libel or contumely, and when such design plainly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record.

Probate of will.

Fromme Bros., for proponents; Robert Payne, for special guardian.

ABBOTT, S.—The special guardian for the infant in this proceeding filed objections to the probate of the last clause of this will on the ground that such clause was superfluous and libelous, and should be refused probate and record.

It reads substantially as follows: "Item. And whereas one of my sons * * * is deceased, and there is a child in existence, which is claimed to be his, and which is named * * * now it is my will that no portion of my estate, real or personal, shall go to or belong to him, his heirs or representatives."

The son mentioned in the "item" aforesaid had not lived happily with his wife, and they had separated after a son had been born to them, whose custody was awarded to the mother, and who is designated as the "child in existence" in said "item;" but upon the hearing in this matter the proper and ceremonial marriage of this son and the legitimacy of his child were admitted in the broadest and fullest manner by the proponents herein, who are also sons of the testator.

The testator disposes of his entire estate, both real and personal, by the clauses of his will which precede this "item;" consequently said "item" effects a disposition of no part of his estate.

A will is an instrument which disposes of one's property, to take effect after death, and should not be permitted to be made a vehicle for libel or contumely, and when such design plainly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record.

The same reasoning would apply to the opprobrious designation of a beneficiary in a will. A beneficiary ought not to be compelled to take a legacy *cum onere*. The opprobrious designation should not be probated or recorded; the dispositive words only should be admitted.

I have been unable to find any case in this State in which this point has been passed upon, but there have been cases elsewhere which establish that probate of part of a properly attested will may be decreed while the rest is rejected, and it would appear that something superfluous may be expunged from a properly executed will, though the right to insert words or reform a sentence is denied. Schouler on Wills, sec. 219; Rhodes v. Rhodes, L. R., 7 App. Cas. 192; Allen v. McPherson, 1 H. L. C. 208; Fawcett v. Jones, 3 Phill. 455; Morris v. Stokes, 21 Ga. 552.

After referring to the English practice of excluding portions of a will from probate under certain conditions, Redfield on Wills, Vol. II, p. 43 (ed. 1866), says: "And we see no reason why the same course should not be pursued here. But it has been held that the court cannot, even with the consent of all parties interested, expunge from the probate any parts of the will which constitute *operative portions* of the instrument. But *offensive passages* have sometimes been allowed to be omitted from the probate, when the omission does not change the legal effect." *In re Wartnaby*, 1 Robertson's Ecc. Rep. 423; see also 1 Williams on Executors, 6th Am. ed., p. 443, and cases cited.

Following the doctrine of these authorities, it seems manifest to me that as this "item" contains no testamentary disposition and is not a necessary or operative part of the will, but simply casts an unwarranted slur upon an innocent child, it should be refused probate and record.

Let decree be presented accordingly.

In the Matter of the Estate of PETER D. HEARMAN, Dec'd.

(*Surrogate's Court, Rensselaer County, Filed January 15, 1892.*)

1. DECEDENT'S ESTATES—LIMITATION—ENDORSEMENT.

To make an endorsement of principal or interest upon a note admissible at all, it must appear to have been made by a creditor at a time when he had no motive to give a false credit, and, at least, before the statute of limitations had created a bar. But where it satisfactorily appears that an endorsement was made at a time when it would be against the interest of the party making it, it will furnish evidence, for the consideration of the trial court, of payment according to its terms.

2. SAME—PROOF OF PAYMENT OF INTEREST.

To prove payment of interest at the time an endorsement purported to be made, in order to take the claim on a note out of the statute, a witness stated that he worked for the claimant that year, and at no other time; that deceased came to claimant's house and stated that he wanted to pay that interest; that claimant replied, "that's right," and that they both went into an adjoining room. *Held*, that the facts and circumstances stated warranted the conclusion as matter of fact that the interest was, in fact, paid at that time and that the endorsement was made at the time it bears date.

This is a proceeding to mortgage, lease or sell the real estate of the deceased for the payment of his debts. Jacob H. Snyder, administrator of the goods, etc., of Jacob A. Snyder, deceased, presents a claim for the sum of \$1,500, with interest thereon, on two promissory notes for \$600 and \$900, respectively, to which claim the heirs at law interpose the defense of the statute of limitations.

George H. Hearman (R. H. McClellan, of counsel), for Charles S. Hearman *et al.*, heirs at law; A. B. Slocum, special guardian for Hiram N. Brown, an infant; C. H. Denio and B. W. File, for Jacob H. Snyder.

LANSING, S.—Jacob Harman Snyder, as administrator of Jacob A. Snyder, deceased, presents a claim, duly verified, upon two promissory notes, made by said Peter Hearman, deceased, and others, to secure the payment of the sum of \$600 and \$900, respectively, whereby they promised to pay, one year after date with interest, said several sums to Jacob A. Snyder, or order. Said notes are dated, respectively, the 2nd and 3rd of April, 1876, and each bear endorsements that interest has been paid each year in full from 1877 down until the 1st day of April, 1884. The last endorsement upon each is dated April 1, 1884, and acknowledges the receipt of interest in full of \$54 and \$36, respectively.

It is admitted that Jacob A. Snyder died May 28, 1878, and that each of the two several endorsements made upon each of said notes prior to his death are in his handwriting.

It was proven upon the trial that the remaining endorsements were in the handwriting of Jacob Harman Snyder, the owner and holder of said notes after the death of his father, Jacob A. Snyder. Peter D. Hearman died August, 1887. Concededly no interest has been paid upon said notes since April 1, 1884, but if made at that time, it would be within six years before the commencement of this proceeding.

The claimant, to establish his claim, called as a witness one William H. Wolf, who testified that he worked for Jacob Harman Snyder for eight months in the year 1884, commencing in the early spring, and that he never worked for him except in one year. That he knew Peter D. Hearman, deceased. That about the last of April or first of May, 1884, Peter D. Hearman came to the house of Jacob Harman Snyder, and he heard a conversation between said Hearman and Snyder as follows: Mr. Hearman said, "Mr. Snyder, I came to pay that little inter-

est." Harny (Jacob H.) said, "That's right, that's right." Then they went into the other room. He further testified that he saw no money paid or any endorsements made upon the notes. This witness was subjected to a severe cross-examination, and it is evident that his memory as to dates is very uncertain and unreliable; but it was established without question, that the season that Wolf worked for Jacob H. Snyder was the spring and summer of 1884; and as he worked there but one season, and as he states the conversation occurred in the spring while he was at work there, it seems reasonable to believe that the conversation which he alleges he heard occurred in the early spring of 1884. Let it be assumed then that the witness is correct as to the time of this conversation, and that the conversation itself occurred as stated by him; the question then arises, what is the effect of this endorsement purporting to have been made April 1, 1884, in the handwriting of Jacob H. Snyder, for the amount of interest then due upon each of these notes, taken in connection with the other evidence in the case?

Two questions are presented for solution before reaching the ultimate question; one of law and one of fact. (1) As to the law:

An action upon a contract must be commenced in six years after the cause of action accrued. Code of Civil Procedure, section 380. In order to take a case out of the operation of the statute of limitation, an acknowledgment in writing signed by the party to be charged is necessary. *Ib.* sec. 395.

But this provision "does not alter the effect of the payment of principal or interest." (Sec. 395.) It follows then that the provision of the Code (sec. 395) changed neither the nature nor effect of payment of interest or principal, nor introduced any rule of evidence in regard to the establishment of the same, different from that existing before the adoption of the Code. *Mills v. Davis et al.*, 113 N. Y. 246; 22 St. Rep. 580.

To make an endorsement of principal or interest upon a note admissible in evidence at all, it must be proved to have been made before the presumption of payment attached by lapse of

time. In other words the endorsement, which is only evidence of the payment, must appear to have been made by a creditor at a time when he had no motive to give a false credit and, at least, before the statute of limitations had created a bar. *Roseboom v. Billington*, 17 Johns. 181.

But where it satisfactorily appears that an endorsement was made at a time when it would be against the interest of the party making it, it will furnish evidence, for the consideration of the trial court, of payment according to its terms. *Roseboom v. Billington*, *supra*.

(2) This leaves for consideration the question of fact: When were the endorsements in question made? I think the evidence tends strongly to show not only that the endorsements were made on or about the time they bear date, but also that the interest upon the notes were at that time paid, which latter fact is sufficient to prevent the bar of the statute, even if no endorsements had been made. The statute provides that payment of principal or interest alone will prevent the bar. It does not require an endorsement to evidence it.

Now what are the facts? Peter D. Hearman comes to the house of Jacob Harman Snyder and states that he came to pay "that little interest." Snyder says "That's right." They go into another room and subsequently the notes are produced bearing the endorsement of interest purporting to have been made at or about that time. It was the duty of Hearman to pay interest on said notes, for it was due at or about the 1st of April, 1884; it does not appear that there were any other notes or obligations held by Snyder against Hearman, and when he came expressing an intention to pay interest, and Snyder expressed a willingness to receive it, and both went into another room together, it may be fairly presumed that they went there to transact there the business upon which Hearman came and which they both had in mind, namely, the one to pay and the other to receive the interest, and to have such payment evidenced by an endorsement upon the notes, and that the same was at that time made and done. It is said that such payment may not have been made.

True, but no fact was shown warranting that conclusion; on the contrary, every fact shown warrants the conclusion of payment. I am satisfied that the facts and circumstances above stated warrant the conclusion as matter of fact that the interest was in fact paid upon the notes at that time. And if the fact of such payment is presumptively established by the evidence without the endorsement, then the payment becomes conclusively established when it appears reasonably clear that at the same time the endorsements were also made upon the notes in the presence of the maker.

Upon the whole, I am satisfied that the evidence is sufficient to warrant the conclusion not only that the endorsements were made at or about the time they bear date, but that the interest upon the notes was at that time paid.

This case is readily distinguishable from the case of *Mills v. Davis, supra*. In that case the court say each endorsement might have been made after the time when the statute had taken effect, and the court add "there is no extrinsic proof of the time when the endorsement was made, nor evidence of explanatory circumstances." It was for the lack of such extrinsic proof and evidence of explanatory circumstances (which was furnished in this case) that the plaintiff's case was held insufficient in the case cited.

In conclusion I shall hold in this matter, for the reasons stated that the plaintiff's claim is established for the sum of \$1,500 and interest thereon from the 1st of April, 1884.

In the Matter of the Estate of WILLIAM F. O'BRIEN, Deceased.

(*Surrogate's Court, Rensselaer County, Filed January 20, 1892.*)

EXECUTORS AND ADMINISTRATORS—WHEN WILL BE REQUIRED TO GIVE BOND.

Where it appears that subsequent to the making of a will the relations existing between the testator and the persons named as executors

became changed so as to warrant a conclusion that they would not have been selected as executors at a subsequent date, and that the testator had an intention of changing them, the rule that they occupy that position by reason of the personal confidence and trust of the testator in them fails, and the court may consider their pecuniary circumstances and qualifications; and where it appears that the estate is large, and the executors have little or no pecuniary means, and their business habits and experience have not qualified them for the management of important pecuniary responsibilities, may require security for the faithful performance of their duties.

This is an application by Ellen O'Brien, Francis O'Brien and Mary Kate O'Brien, three of the five children of William F. O'Brien, deceased, for the revocation of letters testamentary issued to Thomas O'Brien and Charles McCarthy, executors under the will of said deceased. The application is resisted by the executors. The will was admitted to probate on the 15th day of August last, and said executors qualified and letters testamentary were duly issued to them.

This application was made September 25, 1891, upon the ground principally that the executors' circumstances were such that they did not afford adequate security for the due administration of the estate.

The matter was referred to Thomas S. Fagan, as referee, to take the proofs of the respective parties and report the same to the court with his findings thereon.

Myers & Norton, for petitioners; William J. Ludden and L. E. Griffith, for executors.

LANSING, S.—I have carefully read the testimony produced before the referee, together with the briefs of counsel and the findings of the referee. I do not deem it necessary to enter into any extended examination of the facts in this case or of the law pertaining to applications of this character. Each case must depend upon its own circumstances, and but little aid is afforded by the adjudged cases, since no case can be found which is exactly parallel with the present.

It is sufficient to say in general, that these executors are

employees in large business establishments and have been so employed continuously for more than twenty years past at remunerative salaries. Their honesty has not been assailed or questioned in this examination. Substantially the sole question (outside of the question of the personal relations which existed between the deceased and said executors subsequent to the execution of his will) has been the question of the sufficiency of the pecuniary responsibility of the executors to afford adequate security for the due administration of the estate.

The referee has found from the evidence that the executor Charles McCarthy, although in receipt of a comparatively large salary for a great many years, is pecuniarily irresponsible, being the owner of neither personal or real property of any description. That the executor Thomas O'Brien is a person of but little pecuniary responsibility, depending altogether upon the value of a piece of real estate in the city of Troy, his only property, which is assessed at about \$5,000 and mortgaged for about \$4,000.

Section 2685, Code of Civil Procedure, provides that "In either of the following cases, a creditor or person interested in the estate of a decedent may present to the Surrogate's Court from which letters are issued to an executor or administrator a written petition, duly verified, praying for a decree revoking these letters, and that the executor or administrator may be cited to show cause why a decree should not be made accordingly."

Subdivision 5. "In the case of an executor, where his circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate."

Section 2687 provides: "Upon the return of the citation issued as prescribed in the last section, if these objections or any of them are established to the satisfaction of the surrogate, he must make a decree revoking the letters issued to the persons complained of; but the surrogate may in his discretion dismiss the proceedings upon such terms as to costs as justice requires, and may allow the letters to remain unrevoked in either of the

following cases: (Third), where the case is within *subdivision 5 of section 2685*, if the executor gives within a reasonable time, not exceeding five days, a bond as prescribed in article 1 of this title."

Subdivision 5 of section 2685 (or section 18, page 72, 2 Rev. St.), from which said section was derived, has been repeatedly before the court for construction. It is well settled that the choice of an executor by a testator is not restricted to persons of large means, or those whose estates are as great or greater than those proposed to be committed to them. On the contrary, the law permits a person to select from among his friends persons of approved honesty and business qualifications without regard specially to their pecuniary responsibility. *Holmes v. Cock*, 2 Barb. Ch. 426; *Shields v. Shields*, 60 Barb. 56; *Grubb v. Hamilton*, 2 Dem. 414.

The rule is based on the ground that a testator has the same right to exercise his choice in the selection of a person to manage his estate after his death that he has to select one to represent him during his life. The courts will ordinarily respect his wishes in the selection of an executor, notwithstanding it is the settled policy of the law in every case (save where executors, trustees and guardians are appointed by will) to require that the persons appointed to such offices should be persons possessing honesty, integrity and business qualifications and in addition thereto that they should furnish two good and sufficient sureties in double the amount of the property committed to their charge for the faithful performance of their duties. This wide difference, as to security and pecuniary qualification, recognized in the law, between executors and trustees appointed by last wills and those appointed by the court, rests almost entirely for its support upon the presumption that the appointment of executors grows out of personal confidence and trust rather than upon the pecuniary qualification of the executor. Notwithstanding this rule, however, the statute provides, and the courts hold, that however willing the testator may have been to entrust his affairs to a clearly improper person, named as executor in

his will, yet that those interested in the estate at his death are not obliged to abide by his choice.

In this case the will was made some ten years before the death of the testator, and the circumstances are such as to warrant the conclusion that the deceased would not have selected one and probably neither of them as executors had he made his will at or about the time of his death, for it appears that the testator by a memorandum upon his will, made a year or two after it bears date, intended to substitute some other person for Mr. Thomas O'Brien as executor in his will; and although that intent was not effectuated by reason of the will not having been formally re-executed, it sufficiently appears in connection with the circumstances under which it was made that he did *not* at that time desire to have Mr. O'Brien continued as executor under his will; and although their relations subsequently became friendly, the deceased did not change his will in that respect.

As to the other executor, Mr. McCarthy, the relations of the deceased with him for the last few years prior to his death were not such as to warrant the conclusion that he would have selected him as executor, had he made his will shortly prior to his death.

The matter then comes to this: Although the executors have received a valid appointment under the will, yet they are measurably deprived of the benefit of the rule, that they occupy that position by reason of the personal confidence and trust of the testator in them, which the law assumes to stand in the place of pecuniary responsibility. This fact, which is established, must relegate them to the position of those liable under the statute of having their pecuniary qualification to manage estates inquired into in a manner similar to that of persons seeking such appointment from the court. In other words, the reason for the rule having failed, the rule itself falls. The executors are thus deprived of the benefit of the presumption, that they are qualified for their positions, arising from the fact that they have received their appointment from the testator. It seems to me, therefore, that without the slightest reflection upon the

character of the executors, I should consider whether the circumstances of the executors, or either of them, in connection with their business methods and habits, are such as to furnish adequate security for the due administration of the estate.

My conclusion upon the whole is, that as the personal estate is very considerable, amounting to something like fifteen to twenty thousand dollars, and there is also connected with the will a trust of considerable importance, extending through the lifetime of one of the children of deceased, and as the said Thomas O'Brien and Charles McCarthy are possessed of little or no means, and their business habits and experience have not qualified them for the management of important pecuniary responsibilities, that they should give a bond in the usual form, with two good and sufficient sureties for the faithful performance of the duty of their office of executor and trustee in the penal sum of \$30,000, unless it should be made to appear that the personal property exceeds \$15,000, in which case the bond shall be double the amount of the personal estate; and as the costs and expenses of this proceeding have largely been the result of the unwillingness of the executors to furnish a bond as they were authorized to do under section 2686 of the Code, upon the presentation of the petition, I think they should personally pay the disbursements of this proceeding, amounting to the sum of \$101.40, and in case of their failure to give such bond and pay such disbursements within five days after service of an order to that effect upon them, an order may be entered revoking the letters issued to them, or the one so failing to comply with the conditions above prescribed.

In the Matter of the Estate of IRA L. GATES, Dec'd.

(*Surrogate's Court, Chautauqua County, Filed March 9, 1892.*)

**JUDGMENT—LIEN OF JUSTICE'S JUDGMENT FILED IN OFFICE OF COUNTY CLERK
—CODE CIV. PRO., § 1380.**

James Matteson recovered a judgment against the decedent before a justice of the peace of Chautauqua County, which was docketed in the county clerk's office on transcript filed July 3, 1878, and such judgment thereupon became a lien on land of decedent, who died intestate December 13, 1884, leaving no personal property to pay the judgment. The judgment creditor petitioned the Surrogate's Court for leave to issue execution and sell the lands. Opposed by Hiram Putnam, subsequent mortgagee of same lands, claiming the judgment outlawed, and the lien thereof extinguished by lapse of time. Letters of administration were issued upon the estate of decedent September 13, 1888, and the administrator was duly discharged January 4, 1890. *Held*, that although the judgment was outlawed, and more than ten years had elapsed after docketing thereof, yet in this case, under section 1380 of the Code, the lien thereof was continued three years and six months from issuing letters of administration; that the meaning of the word "*thereafter*," as used in the third sentence of said section, relates back to the issuing of letters of administration and not to *date* of decedent's death.

Application for decree to issue execution to sell lands of decedent.

George H. Frost, for Matteson, the judgment creditor; M. M. Allen and J. G. Record, for Putnam, subsequent mortgagee.

SHERMAN, S.—Judgment for \$184.54 was duly recovered June 25, 1878, in favor of James Matteson against the decedent, Ira L. Gates, before a justice of the peace of Chautauqua County, on which a transcript was duly made by such justice and filed, and judgment duly entered and docketed thereon for \$185.29 in the clerk's office of said county on July 3rd of same year. No part of the judgment has been paid, or execution issued to collect it, and same thereupon became a lien on the lands of the decedent described in the petition herein. Soon thereafter the said Ira L. Gates gave a mortgage for \$1,000 on

same lands, which was duly recorded, to said Hiram Putnam, which remains unpaid.

The decedent, on December 13, 1884, being six years and five months after the judgment was docketed, died intestate, leaving no personal property to pay the judgment or other debts owing by him at his decease. An administrator was duly appointed of his estate on September 13, 1888, who settled the estate as such, and was duly discharged January 4, 1890. The order granting leave herein to issue execution being made March 9, 1892, and execution issued to sell said lands only a few days less than three years and six months after granting the letters of administration.

It was claimed by the learned counsel for the mortgagee on the trial herein, and denied by the petitioner, that the judgment was outlawed. The petitioner claimed that the lien of judgment would not expire until March 13, 1892, being three years and six months after letters of administration were granted. The mortgagee claimed that such lien expired June 13, 1888, being three years and six months from death of intestate on December 13, 1884.

The important question in this case arises on construction to be given to the meaning of the word "*thereafter*" in the third sentence of section 1380 of the Code, whether, in the connection used, it means three years and six months after letters of administration were issued, or same length of time after death of decedent. If the latter, the lien had already expired; if the former, it has not.

Such section reads as follows:

"Section 1380. After the expiration of one year from the death of a party against whom a final judgment for a sum of money, or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment debtor was still living. But such an execution shall not be issued unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and a

decree to the same effect is procured from a Surrogate's Court of this State, which has duly granted letters testamentary, or letters of administration, upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section twelve hundred and fifty-one of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll. But where the decedent died intestate, and letters of administration upon his estate have not been granted within three years after his death by the Surrogate's Court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the State at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the Surrogate's Court of the county in which the property on which the judgment is a lien is situated, such court may grant the decree where it appears that the decedent did not leave any personal property within the State upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for three years and six months as aforesaid. But this section shall not apply to real estate which shall have been conveyed, or hereafter may be conveyed, by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors, or any of them, and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared fraudulent by the judgment and decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be necessary to obtain the leave of any court or officer to issue such execution, and the same may be issued at

any time to the sheriff of the county where such property is or may be situated. The person issuing such execution, however, shall annex thereto a description of the real estate against which the same is sought to be enforced as aforesaid, and shall endorse on said execution the words 'issued under section thirteen hundred and eighty of the Code of Civil Procedure,' whereupon said sheriff shall enforce said execution as therein directed against the property so described, and not against any other property, either real or personal, and all provisions of law relating to the sale and conveyance of real estate on execution and the redemption thereof shall apply thereto."

By the first part of the third sentence of above section the order of the County Court or decree of surrogate cannot be made nor execution issued until the expiration of three years after letters testamentary or of administration have been granted. And immediately following in the same sentence are these words, "and for *that purpose* such a lien existing at the decedent's death continues for three years and six months '*thereafter*,' notwithstanding the previous expiration of ten years from the filing of the judgment roll."

These provisions were undoubtedly made to enable the administrator or executor to make an inventory of the personal property, and ascertain whether the judgment or any part thereof could be paid or satisfied from the personal property. And it is quite clear that words, "existing at the decedent's death," are here used only as qualifying words as to the time such lien must commence, and not otherwise in any way affecting the limitation of the time from three years and six months from granting of letters. This view is confirmed by the remaining sentences of said section 1380, providing for cases in which, under the circumstances therein named, leave to issue execution may be granted, where letters have been issued, and limiting the last sentence of such section as follows: "in such case the lien of the judgment existing at the decedent's death continues for three years and six months *as aforesaid*."

There is no time limited by the Code or practice in which

letters of administration may be issued after the decedent's death. If not issued in three years after such death, they may be issued thereafter upon the petition of any creditor, next of kin or other person interested in the estate contingently or otherwise.

Bearing in mind that no order for leave to issue execution can be made under section 1380 in less than three years after letters testamentary or of administration have been granted and such leave is obtained by section 1381 of Code, which expressly provides that notice of application for leave to issue execution "*must* be given to the *executor or administrator.*"

Suppose the next of kin or creditors neglect to obtain such letters, as in this case, until about the time or after the three years and six months have expired from the death of decedent, instead of same time after letters have issued, the latter time dating from issuing of letters is wisely provided for in the construction of the word "*thereafter,*" as claimed by the petitioner, so as to give reasonable time to examine the condition of the personal estate and make an inventory absolutely necessary to ascertain the value of the personal property that may be applied in payment of the judgment or some part thereof, whereas in the former case no such remedy would exist.

If the meaning of the word "*thereafter*" is as claimed by the mortgagee as used in section 1380, why should the words "*as aforesaid*" have been used at the close of the last sentence of said section in place of the word "*thereafter,*" so the sentence would read, "In such case the lien of the judgment existing at the decedent's death continued three years and six months *thereafter,*" instead of "*as aforesaid,*" and thereby giving such sentence a meaning as claimed by the mortgagee.

The question is new, and I have been unable to find any authority bearing upon it except the decision of the learned county judge of Chautauqua County, granting an order a few days since in this case upon the same facts as herein, for leave to issue an execution to collect the judgment in question by sale of said land.

I do not think that the case of *Platt v. Platt*, 15 St. Rep. 217, cited by the counsel for the mortgagee, is in point, as the precise question here involved was not in it.

The following authorities were cited by counsel as bearing upon the questions raised: *Townsend v. Tolhurst*, 32 St. Rep. 21, and cases therein cited; Code, secs. 1251, 1377, 1381, 1379 and 3017; *Matter of Holmes*, 36 St. Rep. 535; *Waltermire v. Westover*, 14 N. Y. 16.

I direct decree for leave to issue execution to sell the land as prayed for in the petition.

(Note.—Affirmed by General Term, 50 St. Rep. 275.)

In the Matter of Proving the Last Will of WILLIAM H. GREEN,
Deceased.

(Surrogate's Court, Rensselaer County, Filed March 8, 1892.)

1. WILL—UNDUE INFLUENCE—DECLARATIONS OF TESTATOR.

While the fact of fraud or undue influence cannot be proved by the declarations, prior or subsequent, of the testator, such declarations are admissible when they denote the mental status or mental fact in issue.

2. SAME.

A change of testamentary intention, however, sudden, which results in giving the inheritance to the heir is not even ground for suspicion when the change follows a reconciliation after estrangement; especially when the reconciliation is stripped of sinister appearance, even, by reason of the first advance proceeding from the testator.

Probate of will.

Two wills are presented for probate; the first of which is dated July 2, 1888, with a codicil dated July 2, 1890, in which Eugene F. Barnes and Albert C. Barnes are named as executors, and the second is dated July 22, 1890, in which Georgianna R. Green is named as sole executrix.

Alden, King & Speck and Henry A. Merritt, for executors of first will; Davenport & Hollister (Charles E. Patterson, of counsel), for executrix of second will.

LANSING, S.—Robert Green, father of testator, a prominent business man and an old resident of the city of Troy, died in 1876, leaving a widow and two children. He was twice married. By his first wife he had a son, the testator. The only surviving child of the second marriage was a daughter, Georgianna R. Green, born some ten years after her brother. He was about forty-eight years old at time of his death.

The property which William H. Green owned at the time of his death was derived principally from his father. It consisted of one-half interest in two brick stores in Troy and a three-story brick building in Brooklyn, and certain stocks and bonds and a collection of pictures, coins and books, all of the value of about \$40,000.

After the death of Robert Green his widow and his two children continued to live together. Mrs. Green became an invalid, and after being confined to the house for several years and to her bed for months, died in November, 1888. Neither William H. nor his sister ever married.

William H. Green continued to reside at Troy until his death, which occurred August 11, 1890, at Patchogue, where he was temporarily sojourning.

Among his relatives, besides his sister, testator had three cousins residing at Troy, children of Mrs. Kate Green and William H. Green (his father's brother), viz., Misses Mamie, Sarah and Emma Green, and six second cousins in Brooklyn, children of a cousin of his father, viz., Eugene F. and Albert C. Barnes, and their four sisters, Misses Emma and Angie Barnes, Mrs. Robbins and Mrs. Wykoff, who are the beneficiaries under the will of July 2, 1888. He had also four cousins, the children of his mother's brother, residing at Peekskill, N. Y., who, with his sister, were the beneficiaries under the last will of July 22, 1890.

The testator was an invalid for some time prior to his death. He was suffering from Bright's disease and an irregular action of the heart. This heart trouble had been chronic for years and made him an invalid, subject to frequent attacks, which prostrated him for days and weeks at a time. He was undersized and quite deformed.

After the death of his stepmother, William H. Green continued to live with his sister until May 1, 1889, when he took apartments on Third street, in the city of Troy. On the 1st of May, 1890, he went to the house of his aunt, Mrs. Kate Green, No. 5 Union place, where his cousins, the Misses Mamie, Emma and Sarah, resided with their mother. He remained there until June 15, 1890, when he went to Brooklyn to visit the Barnes, where he remained until July 9, 1890, when he went to Brighton Beach, Coney Island, in special charge of a nurse, one Peter Fitzharris. He was at that time quite ill. The Barnes visited him there until July 13, 1890. At that time his sister, Georgianna R., in response to his invitation, arrived. On the 22nd day of July, 1890, the will presented by her for probate was drawn by William H. Hollister, Jr., of Troy, her lawyer, but a mutual acquaintance and one who had transacted business for both on a previous occasion. July 24, William H. Green and his sister, accompanied by the nurse, left Brighton Beach and went to Patchogue, a place forty or fifty miles distant, at which place he died August 11, 1890.

By the will of July 2, 1888, presented by Eugene F. and Albert C. Barnes, the testator devised the Troy property to Miss Mamie Green, the Brooklyn dwelling to Miss Emma Barnes for life, the remainder to her sister, Miss Angie Barnes. By this will also he gave to his half sister, Georgianna R. Green, a legacy of \$62.50, and named the Misses Emma and Angie Barnes, Emma and Sarah Green as residuary legatees.

By the codicil to his will, executed July 2, 1890, he gave a legacy of \$200 to Mrs. Wykoff, formerly Miss Barnes, revoked a legacy to a cousin on his mother's side, and gave a legacy in lieu thereof to her sister. He also gave directions as to his own funeral and interment.

By the instrument offered for probate as the will of testator, dated July 22, 1890, he gave, with the exception of \$500 each to four cousins, daughters of John Hyatt, his entire property to his sister, Georgianna R. Green.

The application for the proof of these several wills was consolidated and the matters heard together. The proponent of the later will contested the probate of the first will upon the ground that the testator by his will of July 22 had revoked the former will. The proponents of the first will contested the probate of the last will upon the ground that the last will was not the will of testator, but was obtained by fraud, duress or undue influence of his sister, Georgianna R. Green, the proponent and principal beneficiary.

The sole question to be decided upon this hearing is, was this will of July 22 obtained by fraud, duress and undue influence?

Upon this question the burden of proof is ordinarily upon the party who makes the allegation. *Tyler v. Gardiner*, 35 N. Y. 559; *Baldwin v. Parker*, 99 Mass. 79, 85; *In Matter Will of Martin*, 98 N. Y. 196.

The general rule is that the influence that will avoid a will as undue must amount to moral coercion, restraining independent action and destroying free agency; or the importunity must be such as to constrain the testator to do that which is against his desire. The undue influence which deprives a testator of the free exercise of his will must be exercised in respect to the very act. It is not sufficient for the purpose of establishing undue influence to show that the will is the result of affection and gratitude, or the persuasion which a friend or relative may legitimately use. Courts will hesitate to find that undue influence has been practiced, when the will is fair and reasonable, according to common instincts of mankind, and is such as might with propriety and justice have been made by the decedent. In the absence of evidence of force, threats or coercion, the exercise of an influence springing from family relations or from motives of duty, affection and gratitude cannot be regarded as undue.

But the proof of undue influence need not be direct; it may

be shown by circumstantial evidence, such as sinister conduct attending the execution of the will, mental weakness of the testator, want of harmony of the will with the testator's general intentions, to which may be added interest and opportunity, although the last two are not alone sufficient. *Coit v. Patchen*, 77 N. Y. 539; *Children's Aid Society v. Loveridge*, 70 id. 394; 1 *Jarman on Wills*, 36; *Tyler v. Gardiner*, *supra*.

And it is further held, as a rule of evidence, when a later will is sought to be established to overthrow a prior one, the earlier will being made when the testator was in health and under circumstances of deliberation, and the latter when he was in feeble health and exposed to undue influence, and its provisions hostile to the provisions of the former, the prior will must prevail unless the later will is so proven as to satisfy the judgment and conscience of the court, that it speaks the deliberate intention of the testator. This, however, is subject to the general rule as to burden of proof when fraud and undue influence is the sole and distinct issue in the case. *Tyler v. Gardiner*, *supra*; *Phipps v. Van Kleeck*, 22 Hun, 541, 546; *Baldwin v. Parker*, *supra*.

In ordinary cases the formal execution of the will by a person who can read and write imports a knowledge of its contents. But in a case where a will is prepared or procured by one interested in its provisions, the proponent must go farther, and not only show soundness of mind, but actual knowledge by the testator of the contents of the will, and that he was at that time under no undue or improper restraint of volition. But where it appears that the testator was of sound mind and clearly understood the provisions and contents of the will and appeared to be at that time under no undue influence, the burden which the law casts upon the contestant who alleges fraud and undue influence, returns and remains with him to establish his defense. *Baldwin v. Parker*, *supra*; *Tyler v. Gardiner*, *supra*; *Boyse v. Rossborough*, 6 H. L. Cases, 46.

In the last case Lord Cransworth says: "Where it has once been proved that a will has been executed with due solemnity by a person of competent understanding and *apparently* a free

agent, the burden of proving that it was executed under undue influence is on the party who alleges the undue influence; undue influence cannot be presumed."

In the case of the last will, which was drawn by Mr. Hollister, the formal execution of the will was not only satisfactorily proven, but it appeared that the testator dictated the will, paragraph by paragraph, to the draughtsman in the absence of his sister; and when the will was executed, in the presence of three witnesses, including Mr. Hollister, it was read to him, and he *also* read the will himself in their presence, and after reading it said it was right, signed it, declared it to be his last will and testament, and requested the witnesses who were present to sign it as such. Although he was at that time sick, yet his health was considerably improved, so much so that he sat up during a portion of the time in a chair, and within two or three days thereafter traveled a distance of forty or fifty miles on the cars to Patchogue, retaining sufficient strength after his arrival there to spend the next day but one after his arrival, and several days thereafter, upon the hotel piazza, walking about unassisted, conversing freely with those whom he chanced to meet.

But the proponents of the earlier will insist that, notwithstanding the due and formal execution of the later will, and the testator's undisputed knowledge of its contents, that the later instrument was the result of the dominating will and undue influence exercised by his sister, not in making the will, but in causing the testator to make the instrument; and they insist that the will of July 2, 1888, which was made when the testator was in comparative health, residing with his sister, which was republished by the codicil of July 2, 1890, was the result of a deliberate intent upon the part of the testator to deprive his sister of his property and to give the same to his cousins, the Greens of Troy and the Barnes of Brooklyn, and that such disposition was not only expressed in his will, but had been expressed in a prior will made May 1, 1888, and that the evidence tends to show a still earlier will, made within a year, perhaps, prior to that time, all containing the same provisions substan-

tially in regard to the disposition of his property, in neither of which wills did his sister have any substantial provision in her favor.

It is further insisted that the declarations and conduct of the deceased, embracing a period of three or four years prior to his death, are in strict accord with the intention as expressed in said will and codicil.

In support of this contention, evidence was produced tending to show that the testator complained of petty annoyances which he had been subjected to at his home, when residing with his sister; that he stated he was unkindly treated; that he left the house because of such treatment, and although his outward relations with his sister were polite and friendly, yet at heart he disliked her, and deliberately resolved that she should not enjoy any of his property.

In further support of this contention, it is insisted that whilst testator disliked his sister, he was, on the other hand, sincerely attached to his cousins, the Misses Green, and especially Miss Mamie Green, his principal beneficiary under the will, and the Barnes of Brooklyn, with whom he spent a great deal of time, and of whom he frequently spoke to his intimate friends. That these relations between these respective parties, as manifested in the earlier will, continued down until the arrival of his sister at Coney Island on the 13th of July, 1890. It appears he had been quite sick at Troy from about the 1st of May, 1890, when he left his boarding place on Third street and went to his aunt's, Mrs. Kate Green, No. 5 Union place, where he remained about six weeks. It appears his sister learned of his illness and wrote him a letter of sympathy, dated June 5, 1890, inviting him to her home, proffering to send for him and nurse him, to which he replied the same day kindly, thanking her for her proffer, and said he had been very sick, but was better, and that he would come over and see her as soon as he could. It does not appear that he called, though he apologizes for it in a subsequent letter which he wrote to his sister from Brighton Beach.

The proponents of the earlier will insist that his testamentary intention in regard to the disposition of his property remained, as appears in his will and codicil, without change, until his sister took charge of him on the 13th day of July; that she thereafter discharged his former physician, excluded the Barnes, who were visiting him from day to day, and continued such exclusion until the day of his death, took possession of his person, dominated his will, sent for her own lawyer, had a will drawn in her favor and then removed him secretly to another place where knowledge of his whereabouts was not known and would not be likely to be ascertained by the beneficiaries under his former will, and they invoke the rule that as the former will was executed when the testator was in health and the circumstances tended to show that it was made with deliberation, and the later will made in ill health when in charge of the principal beneficiary, with interest and with every opportunity impelling her to procure a will in her favor, that the clearest and most satisfactory evidence should be given that this extraordinary revolution in the testamentary intention of the testator was brought about by such fair and reasonable means as the law justifies and allows, and that the later instrument was the free act and will of the testator.

We are inclined to hold that this rule must obtain in this case, notwithstanding the general rule that the burden of proof is with the contestants to prove their defense of fraud and undue influence.

The period of time when the change occurred is exceedingly brief, not to exceed eight days. The question then comes to this: Does the evidence in this case furnish satisfactory proof that this complete change, which was wrought in so brief a period under the circumstances disclosed by the evidence in this case, was the unbiased, uninfluenced act of the testator's own mind and will?

The proponent of the later will insists that the proof is satisfactory and complete that the later instrument reflected the mind of the testator at the time of its execution, and in support of her contention claims the will is a natural one, made in accord-

ance with the common instincts of mankind, that it sprang from motives of duty, affection and gratitude, that it was such as might with propriety and justice have been made by the decedent; and, moreover, insists that the testimony, which covers much of the past history of the lives of the testator and his sister, shows that they lived together in one family for many years without bickering or discord, bound together by the ties of love and affection, and that whatever there was that interfered with those relations arose not to exceed three or four years before his death. A cloud of witnesses were produced, family friends and acquaintances, some calling frequently, some visiting and remaining weeks and months together; others, seamstresses and domestics, employed in the house, off and on, for years, who not only testified to friendly and pleasant relationship between the brother and sister, but even at times to marked exhibitions of affection and regard. This testimony is corroborated very greatly by a great body of letters, numbering some 300, extending over a period of ten years, which evince, at least during the earlier period, not only that the testator was satisfied with his home, but gladly returned there when away. In 1883 he writes his sister, she being at that time away with her mother, "I don't know where I shall stop in Troy, anyhow, I shall be awful lonesome in a boarding house." And again, within a day or two, "I wish things were so fixed that you would come home and open the house. You may think I am in a hurry, but I am tired of going about from pillar to post;" and a day or two later writes, "I am stopping at No. 3 Ida terrace, and *may make a change.*" [Ida terrace was the home of Mrs. Kate Green and her daughters.] "*I would like to change over to 72 Fifth street.*" [At that time the residence of his sister.]

I think it is settled by the great weight of evidence that the testator was satisfied with his home and surroundings, and that affection for his sister dominated his heart *at that time* and did for some time after. July 2, 1888, the testator prepared an instrument with his own hand, in which he stated, after bequeathing the body of his estate to his cousins and second cousins, the

Greens and Barnes, "To my sister, Georgianna R. Green, I give and bequeath the sum of sixty-two dollars and fifty cents, hoping that she may make good use of it." It appears that he had made a former will on the 1st of May, 1888, a copy of which was found among his papers in his own writing, which contained the same provisions in regard to the disposition of his property to his collateral relatives as the subsequent will of July 2nd, and also contained the following provision: "Unto my sister, Georgianna R. Green, I bequeath the \$62.50 that *she owes me*, hoping that she will make good use of it." Both of the wills contain the following clause: "I desire the sum of \$1,000 to be set apart to meet legal expenses in case there is any contest to break this my last will and testament, and if any one of the heirs shall contest this my last will and testament, then their bequest shall lapse and be void."

There appears no reason to doubt that these wills expressed the intention of William H. Green at the time they were made. It is manifest that the will of July 2, 1888, like the earlier one, of which it was a copy, and perhaps an earlier one still, was based upon *deep resentment*; somehow, under some circumstances, which the evidence does not explain, the testator felt, whether justly or unjustly, that he had been injured, and its recollection sank deep into his heart, and this will was the undoubted offspring of resentment for an injury, real or imaginary. That it was deep, appears from the fact that time had not softened his feelings towards his sister, although he was courteous and friendly in his external deportment. The will was prepared while living with his sister and before the death of her mother. The resentment had survived an illness in which his sister faithfully and carefully attended him in New York in December, 1889, and undoubtedly continued down to July 2, 1890, for he then republished the will by his codicil of that date. His associations with the Greens and Barnes subsequent to the making of the wills and his withdrawal from the home of his sister in May, 1889, and his not very frequent visits there thereafter, added to the jealousy and bickering which existed

between the different families (Miss Georgianna R. Green on one side and the Greens and Barnes on the other), was not calculated to induce him to change his testamentary intention.

This brings us now to the important question in the case: the change of testamentary intent. That the earlier will was based upon resentment is manifest in the very instrument itself. It is claimed that the resentment or its cause needed but to be removed, when the old love and affection which once reigned in his heart for his sister would return, and then, in accordance with the common instincts of humanity, his sister, his only heir-at-law and next of kin (upon whom the law would cast the inheritance without a will) being the natural object of his bounty, would naturally become his principal beneficiary. It is claimed the evidence shows that this very result took place and that the last will was the result, not of fraud or undue influence, but of returned love and affection for the natural object of his bounty.

In support of this contention it is urged that the evidence shows that he was a man of decided opinions, of strong will and not likely to be influenced to do anything which his heart and judgment did not approve, and the evidence greatly preponderates from those who knew him best, including such witnesses as David M. Green, who was the executor of his father's will, General Joseph B. Carr, his wife and many others, who had known him long and well, neighbors and intimate friends, that he was a person of strong will. The evidence shows beyond all question that he dictated the later will, read it carefully and executed it after an expressed approval of its contents.

But in this case some proof is required in addition, considering the ill-health and weakness of the testator, his peculiar surroundings, his absence from those with whom he had for years associated as friends, and his previously decided expression of his testamentary intention, to show that all resentment had been buried and forgotten and that an entire reconciliation had taken place between this brother and sister and that they were upon their former footing, when, as he stated, *he would be glad to*

change "*from No. 3 Ida terrace*" (*the home of Mrs. Kate Green and her daughters*) "*to 72 Fifth street*" (*his sister's home*).

We find him sick in Brooklyn at the Barnes' with a nurse employed. The doctor recommends a change to Brighton Beach, Coney Island. He goes there, accompanied by the nurse. He is sick unto death with his heart trouble, sits up all night at the window on his knees, panting for breath. The Barnes visit him every day or two, make quite protracted stays, and the testimony tends to show upon one occasion indulged in contentions in his presence which worried and wearied him. On the 11th of July he writes a pathetic letter to his sister, telling her that he was very ill, and adding: "If you go west by way of New York, it would be nice for you to come on here for a day. I was sorry I could not see you before I left Troy, but it wasn't possible. If you come on, I am in room 210. If you wait until fall I may not be able to see you at all, as unless a change takes place soon for the better I shall have passed to the great majority."

His sister immediately came down, and if we may believe the testimony of Mr. Fitzharris, the nurse, she was received with every manifestation of joy and affection. What took place from this time on until his death between this brother and sister is an important matter to be determined. What explanations followed their meeting, how the differences were settled and adjusted, does not appear, and it is not necessary that it should, if they were settled and adjusted. Fitzharris' testimony tends to show a perfect reconciliation between the parties. He testifies that the testator requested her to stay and take charge of him, and told her that he wished to go and live with her again if he got better, and she told him he would be welcome, that he could have his room on the second floor right near the bathroom, where it would be convenient for him (he had roomed on third story before) and where she could take care of him. As to dismissing the physician, Dr. Matson, who had been employed by the Barnes, Fitzharris states the doctor came to

Brighton Beach only once, and that on the 11th of July, and he then stated that he could not come again, that his practice required his attention at home, but recommended Dr. Morrill, a stranger, who attended only once; that on the night after Miss Green's arrival she telegraphed at Mr. Green's direction to Dr. Anderton, a physician whom they both knew and who had attended him when he was sick at the Grand Union hotel in New York in December, 1888; that he came and took charge of the case; that Mr. Green at that time, July 13th, was very much depressed and was very ill, his feet much swollen, his heart's action very bad and his temperature below normal; that Dr. Anderton gave instructions to keep all persons out of the room, and that it was in pursuance to these instructions that the Barnes, who came down on one or two occasions after that time, were excluded. The testator stated to the witness, as he testified, that he had been alienated for some years from his sister and had removed from her house; that the Barnes of Brooklyn and the Greens of Troy had tried to prejudice him against his sister; that he had tried to be a peacemaker between them always, but that they had tried to separate him from his sister, but that he thought more of his sister than he did of them. He also testified that letters were received after their reconciliation from both the Greens and the Barnes (these were put in evidence), in which derogatory remarks were made about his sister; that after reading them the testator passed them to his sister and said: "Never mind, Georgie, when I get well I will make it all right. I will put an end to all these insults and persecutions." He further testified that on one occasion, shortly after her arrival, when the subject of testator's giving her a portion of his property was introduced by him, she said "she did not come for his money, but for his life." In fine, if the testimony of the witness Fitzharris could be relied upon with absolute confidence, it would appear beyond reasonable doubt, so far as the testator was concerned, that all heart burnings and resentments had been removed and that love for his sister reigned in his heart. It is claimed that the legitimate result of this reconciliation was a change of testamentary intention

in regard to his property, so that the sister, instead of those who were wounding his feelings by slighting remarks concerning her, naturally became the object of his bounty.

Mr. Fitzharris' testimony was challenged upon the hearing as partisan, if not worse, and I should be quite disinclined to decide a case of the importance of this one upon his uncorroborated testimony, although there was no impeachment of this witness made, nor attempted, save that furnished by his own somewhat contradictory statements in regard to some minor matters testified to by him. But such corroboration is found in the testimony of Mrs. Kate R. Vail, the manager of the Laurel house at Patchogue during the summer of 1890, where William H. Green and his sister took up their abode on the 26th of July, and where William Green remained until his death. This witness, who was a stranger to the parties till that time, appeared to be disinterested, frank and independent, and a person of much intelligence. Her appearance and manner of testifying impressed me favorably, and satisfied me she was a truthful witness. She testifies that she had several conversations with Mr. Green at her house; that "about 11 o'clock on the following Monday, after he came there on Saturday," she found him alone, sitting on the piazza, with a lot of newspapers before him; he told her "his sister had gone to Troy to close up her house; he said he had been at Patchogue before, and liked the place, and chatted upon general topics. I asked him how long he was going to stay. He said he 'was going to stay quite a little while.' He said he had been to Brighton, but did not like it there, that it was very noisy at night; he was not able to sleep; that he liked it here at night, that he was not disturbed, and was able to sleep. I asked him where he was going from here, and he said 'I am going home with my sister Georgie, and I am going to live with her; I have not lived with her recently, but I am going back to live with her.' He said 'I shall go back to live with her now as long as I live, and if I live until next year, and you run the house, I shall come back

here.' He said *he had sent for* his sister, and she came to take care of him. He said she gave him the very best care. He said his 'sister had gone up to close the house, went up Saturday, and would not be back until Tuesday. This was Monday I had the talk with him. He took his dinner upon the piazza that day." Witness testified she frequently saw William H. and his sister in his room together; she was reading to him, fanning him, and rubbing his hand, and they appeared kind and affectionate toward each other. On another occasion he said: "She was a good, kind sister to him, and that she had been kind and faithful to him during his sickness; that he was going back to live with Georgie; that she was the best friend he ever had."

It must be remembered that the witness knew nothing of these parties, that she had not met Miss Green; that Miss Green was absent at the time of the conversation, had been gone for two days; that the testator was in comparative health, able to walk about the piazza; that he was at the time alone, so that he had ample opportunity to communicate with the Barnes and Greens had he so desired; and if in the making of the last will he had been coerced, unduly influenced, or even overpersuaded, the act was so recent that such influence would have been likely to have left its impress, and have found expression in that conversation, instead of expressions entirely the reverse.

This testimony was not challenged or impeached or sought to be by the contestants of the later will, and it shows a condition of mind upon the part of the testator in absolute accord with the testamentary disposition of his property made by his last will and with the statements of the witness Fitzharris. Some corroboration also is found in regard to his removal to Patchogue (which was regarded by the proponents of the first will as a suspicious circumstance, since it was claimed that it was done solely for the purpose of placing him beyond the influence and reach of the Barnes) in the letter of Mr. Green, dated July 21, 1890, to Miss Crowell, in which he says: "I have been very ill; had several physicians, my sister also closed the house and came down from Troy to nurse me back to health

if possible, and will in a week or so take me to another seashore resort, *as we don't like this one very well.*"

Some question was made upon the trial as to the effect as evidence of the declarations of a testator made prior and subsequent to the making of the will.

It is well settled that the *fact* of fraud or undue influence can not be proved by the declarations, prior or subsequent, of the testator, but such declarations are admissible when they denote the mental status or mental fact in issue.

It is always open to inquiry whether undue influence in any case operates to produce the will, and the conduct and declarations of the testator are entitled to more or less weight whether made before or subsequent to the making of the will, depending somewhat on the circumstances of each particular case. Subsequent declarations are competent when made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testator at the time the will was executed. *Shailer v. Bumstead*, 99 Mass. 128; *Waterman v. Whitney*, 1 Ker. 157; *Marx v. McGlynn*, 88 N. Y. 357.

The declarations in this case which were made to Mrs. Vail were made so near the time of the making of the will (four days) that they are clearly competent as showing the state and condition of mind under which the last testamentary disposition of testator's property was made, and therefore are not only competent, but cogent evidence upon the material question here at issue. And finally the proponent of the later will invokes the rule that the law presumes a testator of sound mind and free volition will in general bestow his goods upon his next of kin and will not disinherit his heir, and assert the further rule that a change of testamentary intention, however sudden, which results in giving the inheritance to the heir is not even ground for serious suspicion, when the change follows a reconciliation after estrangement. I think the rule claimed is correct and that it applies in this case, and especially when the reconciliation is stripped of sinister appearance, even, by reason of the first advance proceeding from the testator.

Finally, with the most careful and conscientious thought that I have been able to bestow upon this matter, which has involved a great amount of time and labor in the examination of many hundred pages of testimony and voluminous briefs of counsel, I have reached the conclusion, in view of the fact that the testator felt that he was "soon to join the great majority," and had sent for his sister who thereafter nursed him tenderly and of whom he declared that she was his best friend and that he was going to live with her during the balance of his life, that the differences which had so long existed between them, which found such sharp expression in his former wills and his letters to the Greens, were removed and that there was a complete reconciliation and a burial of resentment antedating the last will. That thereafter, in the light of that fact, every succeeding circumstance, including the exclusion of the Barnes, the making of the later will, the giving of the power of attorney, the exclusion of the Greens as objects of his bounty, and the inclusion as legatees of his cousins upon his mother's side, appears rational and reasonable, and I find that the testator made his later will uninfluenced save by ties of blood, duty, gratitude and affection.

Let a decree be entered admitting the will of July 22, 1890, to probate.

(Note.—Affirmed by General Term without opinion, 67 Hun, 527, 61 St. Rep. 938.)

In the Matter of the Estate of HEZRON A. JOHNSON, Deceased.

(Surrogate's Court, New York County, Filed June 16, 1892.)

COLLATERAL INHERITANCE TAX—TIME OF VESTING OF ESTATES.

Testator, after making a will giving his property to his wife and issue, executed a deed of trust by which he transferred his property in trust for the support and maintenance of himself and family and on

his death to distribute it according to the provisions of the will. *Held*, that the legatees took by virtue of the will and not the deed, and that the law in force at the death of testator should govern, and such death having taken place subsequent to the passage of the act of 1891, the interests of the wife and children were taxable.

Motion for reargument.

The report of the appraiser was overruled by the surrogate in the following opinion:

RANSOM, S.—The appraiser has reported that the property to which the wife and children of testator became entitled vested at the time of the execution and delivery of the deed, and passed by such deed and not by his will; that the time of such vesting being before the act of 1891, the deed is not affected thereby, and, consequently their interests are not subject to the payment of the tax imposed by the amendment of 1891. It is very plain that no interest vested in these legatees by virtue of the deed. *Townshend v. Frommer*, 125 N. Y. 446, 36 St. Rep. 133. Whatever interest they received from the decedent they became entitled to by virtue of the provisions of the will, and they are unaffected by the deed except so far as by it the grantor reserved to himself the right to dispose of his estate by will. The interests of the wife and children are subject to the amendment of 1891. The matter will be remitted to the appraiser to report anew in accordance with these views.

Miller, Peckham & Dixon, for executrix; Edgar J. Levey, for comptroller.

RANSOM, S.—The testator, by his will, executed May 13, 1882, and a codicil executed May 22, 1889, gave his property in certain proportions to his wife and issue. On November 29, 1889, he executed a deed of trust by which he transferred the bulk of his property, real and personal, to a trustee in trust to invest the same and apply the income therefrom to the support and maintenance of the grantor and his family, and upon the death of the grantor to distribute and pay over the property

and its proceeds to and among the heirs or representatives of the grantor in accordance with the provisions of his will. The testator died in September, 1891, subsequent to the passage of the act by which the law was amended so as to subject to taxation the personal estate of decedents bequeathed to wife or children, where the beneficial interest exceeds \$10,000.

The appraiser reported that the legatees were exempt, holding that they took by virtue of the deed a vested interest in the estate. The surrogate, in a decision appearing at page 200 (April 26, 1892), overruled the appraiser, and held that the legatees took by virtue of the will; consequently, their interests were taxable. The executrix now moves for a reargument, basing her motion upon the decision of the Court of Appeals in *Genet v. Hunt*, 113 N. Y. 158, 22 St. Rep. 774. That case was brought for the construction of the will of Caroline M. Riggs, who, in anticipation of marriage, executed a trust deed, by which she conveyed all her estate, real and personal, to trustees to receive the income and apply the same to her use during coverture, and upon the further trust, if she should die during coverture, to convey the same to such devisee or devisees, in such share or proportion, as she by her last will and testament may direct; and in default of any such direction to convey the same unto such persons living at her death, and being her heirs-at-law, as would be entitled to take the same by descent in case the same was land belonging to her in the State of New York. Testatrix died during coverture, having executed a will by which she directed that said estate be set apart into two equal shares for the benefit of her children. She directed her executors and trustees to take charge of the property, to manage the same, and to apply the income to the support, maintenance and education of said two children during minority, and upon their respectively attaining twenty-one years of age to pay over to each child after so attaining that age the net income of one-half said estate during their respective lives; and after their deaths respectively the respective shares of said estate set apart as above directed shall go to and belong to their heirs-at-law and next of kin re-

spectively, in the same manner as though they were respectively absolute owners of the same. In case of the death of either of said children before attaining majority and without issue, the share set apart for the benefit of the one so dying to be applied to the use of the survivor. If issue, then the issue to receive the same. In case of the death of both children without issue, before attaining majority, then upon the death of the longest liver the property was given, after the payment of certain legacies, in equal shares to her brothers and sisters and their issue. The question presented was whether the trusts created were valid. If the testatrix was the absolute owner of the property at her death, then the trusts were valid, for the absolute ownership was to vest at the furthest within the lives of the two children. The court held that the validity of the trusts was to be determined by the test whether it would be valid if it had been part of the limitation in the trust deed and had been inserted therein at the time the deed was executed; that for the purpose of determining this question the deed and the will must be read and construed together, and inasmuch as when so read they provided for a possible suspension of the power of alienation for three lives they were invalid. An additional reason was that the two children upon whose lives the trusts in the will are limited were not in being when the trust deed was executed and could not have taken such an estate as was limited under the will if it had been limited in the same manner in the trust deed.

It was absolutely necessary that the will should be executed and admitted to probate for the purpose of giving effect to the power reserved in the deed. 4 Revised Statute, part 2, chapter 1, article 3, section 115. Without the will the legatees named therein would not have taken the same interest. While the two instruments are construed together for the purpose of determining the disposition made thereby, and for other purposes, it is a fiction of law which is only resorted to for equitable purposes and its application is not unlimited. As is said by Lord Sugden: "Where a person takes by execution of a power,

whether of realty or personalty, it is taken under the authority of that power, *but not from the time of the creation of that power*. The meaning that the persons must take under the power, or as if their names had been inserted in the power, is that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take as if all that was in the instrument executing had been expressed in that giving the power. So it is in the appointment of uses. If a feoffment is executed to such uses as he shall appoint by will, when the will is made, it is clear that the appointee, *cestui que use*, is in by the feoffment, but has nothing from the time of the execution of the feoffment so as to vest the estate in him. The estate will vest in him according to the nature of the act done and appointment of the use from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the power, but according to the time of the act executing that power; not like the referring back in cases of assignment in commission of bankruptcy, that is, by force of the statute, and to avoid mesne wrongful acts," citing the decision of Lord Hardwicke in the Duke of Marlborough v. Lord Godolphin, 2 Vcs. Sr. 61; 2 Sugden on Powers, 23.

The doctrine thus stated is approved in this State in Jackson v. Davenport, 20 Johns. 536-550, the chancellor saying: "This doctrine, that a deed executing a power refers back to the instrument creating the power, so that the party is deemed to take under the deed from the grantor by whom the power was created, and not from the power, is a fiction of law, and so it was considered in Bartlet v. Ramsden, 1 Keb. 570, *relatio est fictio juris*, according to the resolution in Menvil's Case, 6 Co. Rep. 416, and is upheld to advance a right, not to advance a wrong, or to defeat collateral acts which are lawful, and especially if they concern strangers."

In Seibert's Appeal, 110 Pa. St. 329, testator, by his will, bequeathed his property to certain collateral relatives, and for religious and charitable purposes; subsequently he transferred

all his property, by deed duly acknowledged, to the persons named as executors in his will, they to receive the income of the same to their own proper use during the life of the testator, and at his death to hold the same for the uses and purposes set forth in said will. The court said: "The intent of the testator is to be deduced from the language of his will. An examination thereof clearly leads to the conclusion that its main purpose was to prevent his property from liability to a collateral inheritance tax. The property which he sought to transfer was not to take effect in enjoyment until after his death. This clearly subjects the property to a collateral inheritance tax under section 1 of the act of 1826. The deed executed by the testator on the 14th of August, 1882, did not change the time of enjoyment previously designated in his will. It expressly declared the vendees shall hold the property in trust for the uses and purposes set forth in said will." Citing *Reisch v. Commonwealth*, 10 Out. 521; s. c., 106 Pa. 521.

It will be seen that the Pennsylvania courts, in the cases cited above, while recognizing the fiction of law that the deed granting the power and the will executed thereunder are to be construed as one instrument, hold that the instrument is to be regarded as a deed to take effect in enjoyment upon the decedent's death. The statute of this State corresponds in its language to the Pennsylvania act, and should receive a similar construction. The law when the deed goes into effect, viz.: the death of the testator or donee of the power, should govern, not the law at the time the deed was executed.

In *New York Life Ins. & Trust Co. v. Livingston*, 44 St. Rep. 102, Judge ANDREWS, writing the opinion of the Court of Appeals, says: "The testator owned the property embraced in the trust prior and up to the time the deed was executed. He reserved therein a beneficial interest during his life and a power of appointment by will. This was little less than ownership, and the statute, for the purpose of construing a disposition by will under a power of appointment, treats the subject of the power as *the property of the donor of the power*, and, conclus-

ively, infers an intention in a testator to execute a power where the will disposes of all his property, and the inference is not rebutted except by express language or necessary implication."

The language of the Revised Statutes, 1 Rev. Stat. 737, section 126, is not entirely without significance: "Lands embraced in a power to devise shall *pass by a will* purporting to convey all the real property of the testator unless the intent that the will shall not operate as an execution of the power shall appear expressly or by necessary implication."

Some test of the logic of the position of the executrix may be gained by suggesting, could it be successfully claimed that, for the purpose of charging interest or penalty upon a bequest given in a will which was executed under a power contained in a deed, that the legacy would relate back to the execution of the deed, and that, therefore, the tax accrued at the date of the delivery of the deed, and at that time interest began to run?

Motion for reargument denied.

In re LEAVITT'S ESTATE.

(*Surrogate's Court, New York County, June, 1892.*)

EXECUTOR—WHEN HE SHOULD GIVE BOND AS SURVIVING PARTNER.

It having been provided by articles of copartnership that on the death of one of two partners, the surviving partner might agree with the representative of the decedent as to the continuation or sale of the business, *held*, that as, on the death of one of the partners, the only executor who qualified was the surviving partner, and as he could not therefore agree with himself as to the matters mentioned in the articles, he should, pending an appeal by him as to the amount due to the estate by the firm, give bond, under Code Civ. Pro. sec. 2687, subd. 3, for the funds (representing decedent's interest in the firm) retained by him as executor, the testator's widow and one of the petitioners having consented to such retention pending the convenient winding up of the business.

Petition to revoke letters testamentary and to remove an executor and testamentary trustee.

/ Josephine A. Knuble and Margaret Robert Leavitt petitioned for the removal, and the revocation of letters testamentary of John Howard Foote, executor and trustee of Henry M. Leavitt, deceased, on the ground that as surviving partner of deceased he had continued the business in which they had been engaged, and had retained in the business a sum of money representing the interest of decedent in the firm, admitted to be due the estate.

Robinson, Biddle & Ward, for petitioners; Miron Winslow, for executor.

RANSOM, S.—Application to revoke letters and to remove testamentary trustee. The ground for the application relates to the disposition of a fund of \$30,000, which represents the interest of decedent in a firm of which the respondent is sole surviving partner. It remains (the larger part) still invested in the business at six per cent. interest. The articles of copartnership provided that “in case of death of either party the business shall be settled up as soon thereafter as may be deemed expedient by consent of the survivor and the legal representatives of the party so dying, and the interest of each shall be determined and the business continued or sold as may be mutually agreed upon.” But one of the executors qualified—the surviving partner—and it seems clear that under the circumstances he could not agree (as executor) with himself (as surviving partner) as to the matters referred to in the copartnership articles. There would be an absolute disqualification on his part.

The respondent shows that shortly after testator's death the widow and one of the petitioners herein wrote the respondent that the interest of testator in the business might be continued until such time as respondent could conveniently arrange to close it without embarrassment or loss to him or any interruption to the success of the business. It is certain that up to the present time no complaint has been made of the conduct of the

executor on this score. It is equally plain that the executor fears a possible embarrassment of his business may be caused by the withdrawal of this large sum from the capital of his concern. The petitioners allege, but cannot be said to have established, the financial irresponsibility of the respondent.

On the accounting of the executor there was a contest as to the amount due to the estate from the firm. The referee allowed certain deductions, but was overruled by the surrogate, whose decision was affirmed at General Term. An appeal is now pending to the Court of Appeals. The prosecution of this appeal by this respondent will not be prejudiced by the determination of this application in favor of petitioners, as the judgment against respondent is personal as well as official, and he can personally prosecute the appeal notwithstanding his letters may have been revoked.

The suggestion of respondent that the estate may suffer if there is an immediate liquidation of the business forced by the necessity of paying the estate the balance due from the firm, is not reconcilable with his other statements, where he seeks to impress the court with his undoubted financial responsibility. The fund is earning six per cent. interest in the executor's hands, which is considerably in excess of the income usually derived from investment of trust funds. But the investment is not sanctioned by the law, and it may be that the estate would have the right to hold the executor to account for a sum in excess of six per cent. if by its illegal investment in respondent's business it has earned a greater rate of profit. Section 2685, subdivision 2, makes an investment in securities unauthorized by law ground for revocation of letters. Under section 2687, subdivision 3, the surrogate may direct the executor to give a bond within five days where the circumstances of the executor are such that they do not afford adequate security to persons interested. I think that under the circumstances this latter provision should be required.

The respondent must give a bond as provided in section 2687, subdivision 3, for the funds retained by him as executor.

In re BOARDMAN'S WILL.

(Surrogate's Court, Cattaraugus County, December 29, 1891.)

1. WILL—WHAT IS A SUFFICIENT EXECUTION.

A will will be admitted to probate when the testator sent for the subscribing witnesses to come to his house to witness the execution, and he was explicit in his declaration that it was his will, and in his request to them to sign as witnesses, and one of the witnesses was explicit in testifying testator signed the will in their presence, although the other witness had no definite recollection, but had an impression it was not signed by testator in their presence, and that he did not observe his signature—ten years having elapsed from its execution and the latter witness having written the date of the will immediately preceding the signature of the testator, thereby allowing the assumption that so important an omission as the absence of testator's signature would have attracted his attention.

2. SAME—PROOF OF EXECUTION BY INSPECTION.

When there was a doubt as to whether testator executed a codicil to his will in substantial compliance with the statute, and both witnesses testified that testator said the paper he produced was a codicil to his will and asked them to subscribe as witnesses, which they did in his presence, *held*, that as an examination of the instrument showed that the signatures were all written with the same ink, and apparently at the same time, the codicil should be admitted to probate.

3. WILL—CONSTRUCTION—UNCERTAINTY OF BENEFICIARY.

A bequest to "the heirs of" a deceased daughter is not void for uncertainty as to the beneficiary.

4. SAME—PROVISION AS TO MONUMENT.

The will in question directed that after payment of debts the balance and remainder of the estate, real and personal, should be expended in the building of a monument and a suitable fence and fixtures. *Held*, that this was no more than a direction to his executors to set apart a reasonable portion of the estate, suitable to testator's station in life, for that purpose.

Proof of will.

Nash & Willson and W. S. Thrasher, for proponents; D. E. Powell and William Woodbury, for contestants.

SPRING, S.—The testator sent for the subscribing witnesses to come to his house in the night, to witness the execution of his will. It had been previously drawn, and he personally supervised its execution. He was explicit in his declaration that it was his will, and in his request to them to subscribe it as witnesses.

One of the witnesses is explicit in testifying testator signed the will in their presence, while the other has no definite recollection, but an impression it was not signed by the testator in their presence, and that he did not observe his signature.

Ten years have elapsed since its execution, and Mr. Hunton has evidently forgotten the details of the occurrence.

He wrote the date of the will immediately preceding the signature of the testator, and so important an omission as the absence of the name of the testator would have attracted his attention.

There is more doubt as to the codicil. That instrument, however, does nothing but appoint an executor, and I think there was in its execution a substantial compliance with the statute.

He took the will and codicil to the store personally, and while this codicil was not a holograph instrument, it was prepared for him before he went to have it executed. It was drawn on the back of the original will, and testator was evidently familiar with the formalities incident to the execution of wills, as is shown by the clearness of his directions when the original will was drawn.

Both witnesses agree that he said it was a codicil to his will and asked them to subscribe as witnesses, which they then did in his presence. In controversies of this kind it is proper to make an inspection of the document itself. See *Matter of Wilcox*, 37 St. Rep. 462. And an examination of the signatures convinces me they were all written with the same ink and apparently at the same time.

Both the will and codicil should be admitted to probate.

The will was as follows:.

First. I give and bequeath to the heirs of my daughter

Mariah Theresa Eddy now *diseased* the sum of five hundred (500) dollars *shair* and *shair* alike.

Second. That after paying all my debts after my death it is my will and direction that the *ballance* and remainder of all my property, *boath* real and personal, *shal* be expended in the building and erecting a monument at the head of my grave *together* with *sutible fense* and fixtures.

The construction of the second clause of the will is put in issue by the objections filed. The counsel for the contestants, in a very elaborate brief, argues with much ingenuity that there is no ascertained beneficiary, and hence that the will is void for uncertainty, and cites a number of authorities, of which *Holland v. Alcock*, 108 N. Y. 312, 14 St. Rep. 761, and *Read et al. v. Williams*, 125 N. Y. 560, 35 St. Rep. 909, are samples. I do not think those cases are applicable. Had the testator directed in plain, unequivocal terms that his executors expend a reasonable sum in the purchase of a monument to be erected at his grave, no one would have questioned the validity of the direction. The erection of a monument is one of the incidents to the administration of an estate of a decedent of the same class as funeral expenses. *Wood v. Vandenburg*, 6 Paige, Ch. 277-285. And such a provision is one that a testator has the right to make, even to the extent of all of his property. *Pfaler v. Raberg*, 3 Dem. 360; *Matter of Frazer's Accounting*, 92 N. Y. 239-249; *Emans v. Hickman*, 12 Hun, 425.

But a fair interpretation of this clause is no more than a direction to his executors to set apart a reasonable portion of his estate for the purposes stated. He was a farmer who had acquired a small competence by dint of the frugality and self denial which the life of a small farmer implies. He had reared a large family who had remained with him until they severally attained majority. He lived at a distance even from a small village, and a man of his stamp would hardly desire that the entire savings of his provident life should be devoted to the erection of a tombstone in a country graveyard, soon to be covered over with the weeds and vines, which are the usual

adornments of such a place. He provided for a suitable fence and fixtures, and evidently had in mind a corresponding fitness in the purchase of his monument. But he preferred to trust to the wisdom of his executors in making this outlay than to his children, who had left home and become scattered.

In *Emans v. Hickman*, 12 Hun, 425, *supra*, a similar direction was construed to mean an expenditure suitable to his station in life. While a literal interpretation of the language employed would seem to imply testator intended to have all his residuary estate used in the erection of this monument and the adornment of his burial lot, yet, in arriving at his real intent, we must look at all the circumstances surrounding his life, and they would not uphold so extravagant an outlay.

Certainly this interpretation does no greater violence to the language used than in the case cited. The testator provided in this clause that all of his property remaining after the payment of his debts should be expended for the purposes stated. A literal construction of this language would lead to the exclusion of the bequest in the first clause, and such assuredly was not his intention, for he designed the monument clause to be subsidiary to the previous bequest.

Wherefore, a fair interpretation of his will leads to about the following results:

First. The payment of the expenses of this proceeding, and of administration.

Second. The payment of his debts and ordinary funeral expenses.

Third. The payment of the first bequest.

Fourth. The purchase of a monument and the adornment of his burial lot, for which no more than \$500 should be expended.

Fifth. The balance to his heirs-at-law and next of kin in accordance with the laws of descent and distribution.

(Note as to what is a due execution of a will under 2 Rev. Stat. section 40, and Code Civ. Pro. section 2620.

STATUTES.—GENERAL OBSERVATION.—TESTATOR'S SIGNATURE.
—ACKNOWLEDGMENT. — PUBLICATION. — SIGNATURE OF
WITNESSES AT TESTATOR'S REQUEST.—EXECUTION UNDER
CODE CIV. PRO. SECTION 2620.

STATUTES.

It is provided by 2 Rev. St. 63, section 40, that every will shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made in the presence of each witness or acknowledged to each witness.

3. The testator at the time of making such subscription, or acknowledgment, shall declare the instrument so subscribed to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.

Code Civ. Pro. section 2620, provides that "If all the subscribing witnesses to a will are, or if a subscribing witness, whose testimony is required is, dead, or incompetent, by reason of lunacy or otherwise, to testify, or unable to testify; or if such a subscribing witness is absent from the State; or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action."

GENERAL OBSERVATION.

It will be observed under the statute there are four essential requisites to the due execution of a will:

1. Testator's signature at end of will.
2. His signing, or acknowledging his signature, in the presence of each witness.
3. Publication by testator at the time of signing or acknowledgment.
4. Two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at testator's request.

There must be a substantial compliance with these requisites

otherwise the will is not properly executed, even although there is not the slightest fraud. (Matter of Andrews, 162 N. Y. 1.)

Attestation clauses to wills usually contain an allegation that the witnesses signed the will in the presence of testator and of each other.

But this, although desirable, is not necessary. (Spaulding v. Gibbons, 5 Redf. 316; Lyon v. Smith, 11 Barb. 124; Hoysradt v. Kingman, 22 N. Y. 372; Matter of Phillips, 34 Misc. 442.)

If it is not intended that the witnesses should, or they do not, sign in presence of testator and of each other, the draughtsman should, before the witnesses sign, omit the allegation from the attestation clause, as an untrue attestation clause may result in a failure to establish statutory execution.

The burden of proof is on the proponent to prove that the will was duly executed, and the requirements of the statute complied with. (Matter of Hurlbut, 48 App. Div. 91; Matter of Elmer, 88 Hun, 290, 68 St. Rep. 417.)

Even if the proof be clear as to formal execution and attestation, proponent must show affirmatively that testatrix had an intelligent knowledge of the contents of the will. (Barry v. Boyle, 1 T. & C. 422; Townsend v. Bogart, 5 Redf. 93; Hyatt v. Lunnin, 1 Dem. 14; Cooper v. Benedict, 3 id. 136; Heath v. Cole, 15 Hun, 100; Jones v. Jones, 42 id. 563; Matter of Green, 67 id. 527; Matter of Sampson, N. Y. L. J., June 7, 1891 (N. Y. Sur. Ct.); Rollwagen v. Rollwagen, 63 N. Y. 504; *Re De Castro*, 32 Misc. 193.

An attorney who prepares and superintends the execution of a will, but is not a subscribing witness thereto, is not a competent witness as to its execution. (Matter of Sears, 33 Misc. 141.)

TESTATOR'S SIGNATURE.

A will is not subscribed at the end thereof within the meaning of the statute, when it is drawn on a printed blank of four pages joined at the sides, and the draughtsman having filled the blank on the first page, turned to the third page and filled that, marking it at the top, "2nd page," and then turned to the second page, containing in print at the top, the appointment of the executor, and the attestation clause, and marked it at the top "3rd page," and the will was thereupon executed by the testatrix affixing her signature at the end of the printed matter

on the second page, the witnesses also affixing their signatures at the foot of the printed attestation clause on the same page.

The will on the first and second pages was complete, and the court observed that "there is nothing to prevent filling up the vacant third and fourth pages with any number of additional provisions, including, as in this case, a residuary clause, allowing an executor to dispose of the residue in such manner as he deemed proper," but added, "The question is not whether from the proofs in this case the page following the signatures of the will is in fact a part of testatrix's will by reason of her established intention, but is the instrument so drawn, subscribed at the end thereof as the statute commands?" (Matter of Andrews, 162 N. Y. 1—citing *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of O'Neil*, 91 N. Y. 516; *Matter of Conway*, 124 N. Y. 455; *Matter of Whitney*, 153 N. Y. 259; *Matter of Blair*, 152 N. Y. 645, 84 Hun, 581; *Willis v. Lowe*, 5 Notes of Cases, 428; *Re Parslow*, id. 712; *Re Tookey*, id. 386; *Ayres v. Ayres*, id. 375; *Sweetland v. Sweetland*, 4 Swabey & Tristram, 6; *Smce v. Bryer*, 6 Moore's P. C. Cases, 404; *Hays v. Hurden*, 6 Penn. St. 409; *Glancy v. Glancy*, 17 Ohio St. 134.)

A will will be denied probate, when it appears, from the evidence of experienced handwriting experts, coupled with surrounding facts and circumstances, that the alleged signature of the testator is a forgery, although the two attesting witnesses gave positive testimony as to the execution of the instrument, and identified it, as they might be honestly mistaken, and their signatures upon the paper propounded reproduced from a genuine document not brought to light. (Matter of Albinger, 30 Misc. 187.)

It was held in *In re Fitzgerald's Will*, 33 Misc. Rep. 325, that the fact that the will was written on three sheets of note paper did not impair its validity, when it also appeared that the several sheets had appended to them the testatrix's signature, all for the obvious purpose of identifying each sheet as a part of the will. (Citing Matter of Snell, 32 Misc. Rep. 611, and cases cited.)

In Matter of Murphy, 48 App. Div. 211, however, the court held (although the point was not in controversy) that when a will is written "fly-leaf" (or where the fold is at the top of the instrument), and not "bookwise" (or where the fold is at the side), the sheets, being separate, must be fastened at the top by ribbon, metal clasp, mucilage, or other object.

Where, however, blank spaces intervene between the end of the instrument and the subscription, or provisions follow the subscription, probate will be refused. (*Re O'Neill*, 91 N. Y. 516; *Re Whitney*, 153 id. 259; *Re Andrews*, 43 App. Div. 294; *Re Fults*, 42 id. 593; *Re Conway*, 124 N. Y. 455.)

Probate of a will which is partly printed and partly written, will not be refused because there are blank spaces between the written and printed matter not ruled off. (*Matter of Murphy*, 48 App. Div. 211.)

When a testatrix in the presence of two witnesses writes her name in a blank space left purposely by her in the attestation clause, and thereupon declares the paper to be her will, and requests the witnesses to sign as subscribing witnesses, which they do in her presence, there is a sufficient subscription by testator at the end of the instrument. (*Matter of Noon*, 31, Misc. 420, 65 N. Y. Supp. [99 St. Rep.] 568—citing *Matter of Acker*, 5 Dem. 19; *Re John Walker*, 2 Swaby & Tristram, 354; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of Andrews*, 162 N. Y. 1.)

A will partly written and partly printed, and which is signed at the end as required by the statute, will be refused probate when it appears that another paper on which was written several bequests was attached to the will by means of pins at the end of the second clause thereof, although no fraud was intended. (*Matter of Fults*, 42 App. Div. 593, 59 N. Y. Supp. 780. See also *Matter of Whitney*, 153 N. Y. 259, 47 N. E. R. 272; reversing 90 Hun, 133, 70 St. Rep. 259, 35 N. Y. Supp. 798.)

A testator's signature after the attestation clause, when nothing intervenes, is a signing at the end of the will. (*Matter of Laudy*, 78 Hun, 479, 60 N. Y. St. Rep. 700, 29 N. Y. Supp. 574, 62 N. Y. St. Rep. 225, 30 N. Y. Supp. 848.)

Otherwise, when clauses of the will intervene between the signature and attestation clause. (*Matter of Sanderson*, 9 Misc. 574, 62 N. Y. St. Rep. 225, 30 N. Y. Supp. 848.)

ACKNOWLEDGMENT.

The will (even though holographic, and though the witnesses saw decedent's signature, and read the attestation clause or a portion thereof, including the words therein, "will and testament") must be either signed in presence of the attesting witnesses, or acknowledged to each of them by the testatrix as her will, and also declared by, or in some way communicated by,

her to the witnesses that it was her will. (Matter of Turell, 166 N. Y. 330; affirming s. c. 23 Misc. 106.)

Two of the subscribing witnesses to a will testified that all the statutory requirements were complied with, except only that the deceased did not sign the instrument in their presence or exhibit her signature to them. The will was holographic, and decedent was an intelligent woman. Three witnesses signed the attestation clause. The third witness, not examined, made no question as to its accuracy. Held, on the testimony of a fourth witness, who testified that every statutory formality was complied with, that the will should be admitted to probate. (*In re Fitzgerald's Will*, 33 Misc. Rep. 325—citing Matter of Cottrell, 95 N. Y. 329; Matter of Carey, 24 App. Div. 541, 542; Code Civ. Pro. sec. 2620.)

If the witnesses do not see testator sign, but see testator's signature, acknowledgment by testator is not necessary, provided the will is duly published. (Matter of Markey, 110 N. Y. 611; Matter of Bernsee, 141 N. Y. 389.)

Where there is no fraud, if the signature of testatrix is visible and the witnesses hear the acknowledgment, and the declaration by testatrix that it is her will, but they do not look closely to see the signature thus acknowledged, probate should not be refused because the witnesses are ignorant, careless or indifferent. An inflexible rule that the witnesses must remember that they not only saw, but recognized and identified the signature of the testator at the time of acknowledgment, would sometimes defeat the object of the statute and lead to injustice. (Matter of Landy, 161 N. Y. 429, 55 N. E. 914; reversing Matter of Landy, 31 App. Div. 630.)

Acknowledgment to one witness is insufficient when neither witness saw testatrix sign, nor saw her signature. (Matter of Abercrombie, 24 App. Div. 407, 43 N. Y. Supp. [82 St. Rep.] 414.)

Although one of the witnesses testified that testator did not sign will, or acknowledge it in his presence, the will may be admitted to probate when it appears from the evidence that there was a substantial compliance with the statute. (Matter of Carev, 24 App. Div. 531.)

The testator must sign before the witnesses sign, otherwise he must acknowledge his signature to them. (Matter of Blair, 16 Daly, 540, 16 N. Y. Supp. 875.)

PUBLICATION.

Publication is as necessary in the case of a holographic will, as in other cases, although in the former case the facts of publication will not be so sharply scrutinized. (Matter of Turrell, 28 Misc. 106.)

It is not essential to the due publication of a will that the testator shall declare in express terms, in the presence of the subscribing witnesses, that the instrument is his last will. It is sufficient if he in some way makes known to them, by acts or conduct, if not by words, that it is intended and understood by him to be his will. (Matter of Sears, 33 Misc. 141—citing *Lane v. Lane*, 95 N. Y. 494.)

When a long lapse of time has intervened since the execution of a will, and it has been prepared and executed under the superintendence of the attorney of the testatrix, who was a capable woman, and its terms were equitable, and no subsequent will was executed, it will be admitted to probate, although the witnesses cannot recollect the fact of publication or request to sign, when it appears that the attestation clause signed by the witnesses recites the fact that such publication and request were properly made. (Matter of Sears, 33 Misc. 141—citing *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Matter of Bernsee*, 141 N. Y. 389; *Matter of Pepoon*, 91 id. 255; *Matter of Cottrell*, 95 id. 329; *Brown v. Clark*, 77 id. 369; *Matter of Graham*, 9 N. Y. Supp. 122; *Matter of Hunt*, 110 N. Y. 278; *Matter of Rounds*, 7 N. Y. St. Rep. 730; *Matter of Townley*, 1 Connoly, 400; *Matter of Wilcox*, 14 N. Y. Supp. 109; *Matter of Lantry*, 5 id. 501; *Matter of Frey*, 2 Connoly, 70.)

When a will, after being written out, was read over to a testatrix, who then said, in the presence of both the subscribing witnesses that "it was all right," there is sufficient evidence of publication. (Matter of Buell, 44 App. Div. 4, 60 N. Y. Supp. [94 St. Rep.] 385.)

Probate will be refused when testatrix requested the only witness produced to sign the "instrument," even although a full attestation clause declared the instrument to be her last will. (Matter of Delgrat, 27 Misc. Rep. 355.)

SIGNATURE OF WITNESSES AT TESTATOR'S REQUEST.

A full attestation clause supplies whatever omissions there are in the oral testimony as to the request to the witnesses to append their signatures. (Matter of Bernsee, 141 N. Y. 389.)

It is not necessary that the attesting witnesses should sign in

the presence of the testator. In *Matter of Phillips* (Sur. Ct., N. Y. Co., 1901), 34 Misc. Rep. 442, the witnesses signed their names to the will in a room adjoining that in which the decedent was lying, and they did not agree as to whether the decedent could have seen them as they wrote their names. All the other statutory formalities were complied with. Held, that the will was entitled to probate—citing *Lyon v. Smith*, 11 Barb. 125; *Ruddon v. McDonald*, 1 Brad. 352; *Herrick v. Snyder*, 27 Misc. Rep. 462, 59 N. Y. Supp. 229.

The witnesses sign at the end of a will when they sign at the beginning of the fourth page of a sheet of note paper, the second and third pages being blank, and the testator's signature appearing at the foot of the first page. (*Matter of Singer*, 19 Misc. 679, 44 N. Y. Supp. [78 N. Y. St. Rep.] 606.)

When in substance and effect it appears that, either by testator's own direct request, or that of her attorney, who drew the will in her presence, and asking, in her aid and assistance, the two witnesses were requested to subscribe to it as her will, and as subscribing witnesses, held that the requirements of the statute were complied with. (*Matter of Voorhis*, 27 St. Rep. 368, 7 N. Y. Supp. 596, 4 Silv. 504.)

The witnesses do not sign at the end of the will, when before its execution a clause is added after the attestation clause, and the witnesses sign at foot of the attestation clause and before the added clause, although the testator signs and seals same after the testimonium clause and also after the added clause, and the will is therefore not executed in accordance with the statutory requirement. (*Matter of Blair*, 84 Hun, 581, 66 N. Y. St. Rep. 320, 32 N. Y. Supp. 845.)

EXECUTION UNDER CODE CIV. PRO. SEC. 2620.

Where the subscribing witnesses to a holographic will, as well as the testator, were dead, and their signatures to the will (which was a natural one) were satisfactorily proved, and a notary testified that the testator brought the will (which was executed in 1863) to him in 1890 to "freshen it up," that testator detailed the circumstances of execution, showing that the statute had been complied with, and that he (the notary) thereupon drew an acknowledgment upon the will and testator signed and swore to it before him as a notary public, held, that although there was no attestation clause, yet as the most liberal presump-

tion in favor of due execution should (from the age of the document) be indulged in, although it was doubtful if it could be considered an ancient document, and as it appeared by the will itself that it was published and declared by the testator to be his last will and testament, and was signed, sealed and delivered on the 9th day of January, 1863, this, coupled with testator's declarations (which were competent evidence), sufficed to warrant the surrogate in admitting the will to probate under Code Civ. Pro. sec. 2620. (Matter of Briggs, 47 App. Div. 47, 62 N. Y. Supp. [96 St. Rep.] 294.)

Where a witness (a lawyer) is dead, a will and codicil will be admitted to probate under Code Civ. Pro. section 2620 on proof of the handwriting of the testator and of the deceased witness, when there is a full attestation clause, although the surviving witness could not recollect the circumstances attending the execution of the will, but he did remember testator's request to him to sign as a witness and identified his signature under the attestation clause. (Matter of Brissell, 16 App. Div. 137.)

When the signatures of testator and of a deceased witness have been proved, and another witness testifies the statutory formalities were complied with, a will will be admitted to probate, although a third witness was not absolutely certain he saw testator's signature at the time he witnessed the will, but thought he did, as the last page of the will was spread out before him. (Matter of de Haas, 19 App. Div. 266.)

To entitle a will to probate under section 2620, the testator's signature must be proved. Where the testator signed by making his mark, and one of the witnesses was dead, and the other witness did not see the mark made, other evidence must be produced showing that testator actually made the mark. (Matter of Porter's Will, 1 Misc. 262, 54 N. Y. St. Rep. 239, 22 N. Y. Supp. 1062.)

In the Matter of the Judicial Settlement of the Accounts of
WILLIAM H. PROCTOR, Executor of JOHN HILDEBRAND, De-
ceased.

(Surrogate's Court, Cattaraugus County, Filed November, 1892.)

1. EXECUTORS AND ADMINISTRATORS—FUNERAL EXPENSES.

Where an executor has proceeded in good faith, his claim for reimbursement for an expenditure of sixty dollars for funeral expenses should not be denied on the ground that such expenditure was unwarranted.

2. SAME—ASSETS—WIDOW'S ALLOWANCE.

Where the testator delivered to his executor certain notes with directions to collect the same and use the proceeds in paying his funeral expenses and for a monument, such notes do not form a part of the assets of the estate and are not subject to the rights of the widow.

Settlement of the account of the executor of the will of John Hildebrand, deceased.

J. K. Ward, for executor; E. D. Northup, for widow; A. Ward, creditor, in person.

DAVIE, S.—John Hildebrand died in the town of Ashford, Cattaraugus County, December 3, 1889, leaving a will, which was admitted to probate March 26, 1890. William H. Proctor was named in said will as executor, and now presents an account of his proceedings as such for judicial settlement. Testator left him surviving his widow, but no child. An appraisal of his estate was made, and an inventory thereof filed during the time that chapter 406 of the Laws of 1889 was in force. In making such inventory, in addition to the articles exempt to the widow by the Revised Statutes, 2 Rev. St. 83, the appraisers set off to her the other personal property of the testator, amounting to \$42.75. They also appraised and assumed to set off to her the real estate of the testator, consisting of twenty-five acres of land of the value of \$625. The executor sustained the funeral ex-

penses of the testator to the amount of sixty dollars, and incurred necessary expenses in the probate of said will and in the administration of said estate to the amount of \$99.70. The account filed shows an increase of inventory to the amount of \$101.40. Such increase arose from the following facts: Prior to the death of the testator he delivered to Proctor two promissory notes owned by testator, with instructions to collect the same, and use the proceeds thereof in defraying his funeral expenses and in the purchase of a tombstone for his grave. During his lifetime testator received from Proctor the sum of five dollars of the proceeds of said notes, and the balance, \$101.40, remained in Proctor's hands at the time of the death of the testator. The widow objects to the items charged in the account for funeral expenses as unreasonable and unwarranted, and asks that this increase of \$101.40 be set off to her, claiming that the same is absolutely exempt to her under the statute referred to, chapter 406, Laws 1889, and that she is entitled to take the same free from charges for funeral expenses or expenses of administration. The objection that the amount paid out by the executor for funeral expenses is unwarranted is not tenable. The authority of an executor to pay the funeral charges of his decedent, even before the granting of letters, is regulated by statute. 2 Rev. St. 71. His duty so to do is well defined under the common law. *Rappelyea v. Russell*, 1 Daly, 214. In determining whether an expenditure is warranted or not, the executor is only chargeable with knowledge of the apparent condition of the estate. *In re Rooney*, 3 Redf. 15. It is entirely apparent that the executor, in this case, has acted in entire good faith. The expenditure was a moderate one, and the executor's claim to be reimbursed should not be denied on the ground that the expenditure was unwarranted.

A somewhat more perplexing question, however, is raised by the application of the widow to have this \$101.40 set off to her. The widow could not, of course, be deprived of her statutory exemptions by any default on the part of the appraisers in not setting off to her all she was entitled to; and in a proper case

the decree upon judicial settlement should remedy the omissions of the appraisers, Code Civ. Pro. section 2721. But I am of the opinion that the act of the testator in turning over these notes to Proctor, with instructions to expend the proceeds for a specific purpose, puts it beyond the claim of the widow. The testator had the unrestricted right to use the proceeds of these notes in any manner he saw fit, for his own individual benefit, or even to give the same away, without regard to the rights of the widow. Testator had substantially disposed of the proceeds of the notes; that is, he had turned the notes over to Proctor with express instructions to expend the receipts therefrom for a certain purpose; and Proctor was justified, without regard to the execution of his trust as executor, in making the disposition directed. The appraisers, in making the inventory and in setting off the real estate to the widow, evidently entertained a mistaken impression of the terms of the statute. Chapter 406, Laws 1889. The widow gets no additional interest in the real estate in this case under the terms of that statute. Section 1 of that act amends the provisions of chapter 2, part 2, of the Revised Statutes, relating to title to real estate by descent, by enlarging the interest of the widow therein in cases of intestacy, but such section has no application to a case like this, where there is a will. The additional exemptions to the widow provided for by section 2 of said act are confined to personalty. The words of the act are: "In case the interest of the widow in the real estate of the deceased husband, in addition to her dower right, and together with said \$150, shall be of less value than \$1,000, then said appraisers shall set apart for the use of such widow * * * personal property, which, together with said real estate, shall amount to \$1,000."

Under that section the appraisers had nothing whatever to do with the real estate, except to appraise the interest of the widow therein, in order to determine the additional amount of personal property to be set off to her. A decree should be entered herein disallowing the claim of the widow to any part of the \$101.40, permitting the executor to retain therefrom the amount of the

funeral expenses as set forth in his account; also adjusting the expenses of administration at the amount charged in the account, and adjudging the same to be a valid claim against the estate.

In the Matter of the Probate of the Will of JAMES FINN,
Deceased.

(Surrogate's Court, Westchester County, Filed November, 1892.)

1. WILL—TESTAMENTARY CAPACITY.

Where it appears that the testator was not influenced in any way in the drawing of his will, and fully understood the fact of the existence of his wife and children and others who were the objects of his bounty, and the extent of his estate, the mere fact that he gave his children but an inconsiderable portion is not sufficient to show want of testamentary capacity.

2. SAME—MISTAKE AS TO EXECUTOR.

A mistake of testator as to the person nominated as executor will not render the will void.

Petition for the probate of a decedent's will, executed while he was a patient in a hospital.

F. X. Donoghue, for Nathan A. Warren, executor; Joseph F. Daly, for St. Matthew's Church; Arthur J. Burns, for contestants.

COFFIN, S.—The deceased left a widow, Catharine Finn, and two sons by a former wife, John and James Finn, which sons are the contestants. After a careful consideration of the facts developed by the testimony, the conclusion that the deceased was possessed of a sound and disposing mind when the will was made seems quite irresistible. He sent for the attorney to come and draw it. He fully understood the fact of the existence of his wife and children, and of others who were made objects of his bounty. The attorney was ignorant on the subject, and received

the instructions as to the provisions of the will wholly from the deceased, who also stated correctly the amount of his estate, to wit, about \$6,000 in money. By the paper propounded he gives to his wife for life the use of the whole. At her death he gives \$500 to the children of John and Julia Fox, of Galway, Ireland; to his sister in Ireland, \$2,000; to the children of John Finn, of the same place, \$1,000; to the children of James Finn, of the same place, \$700; to his own sons, \$100 each; to Sister Josephine, for the benefit of St. Matthew's School, Hastings, \$300; for saying of masses for the repose of his soul, \$25; and the residue (about \$1,275) to Rev. David O'Connor, for the benefit of St. Matthew's Church, Hastings. However much we might feel disposed to criticise these provisions, and especially those for his own children, yet it cannot be denied that being competent to make the will, and not subjected to any influence, undue or otherwise, it must be permitted to stand as a final disposition of his estate.

It is claimed that there was a mistake made in the person nominated as executor, and that the will is void for that reason. If such mistake were made, it is not considered that that fact would furnish a sufficient ground for its rejection. It might still be admitted to probate as to the disposing portions, as they are in no way involved, and an administrator with the will annexed appointed. There were three physicians connected with the hospital, Dr. Warren, Dr. Miles and Dr. Duffy. The latter two attended the patient; whether the first did or not does not appear. After the question as to who should be named as executor had been discussed between the deceased and his lawyer, the testator suggested that "the doctor" be the executor. On being asked the name, he did not recall it, whereupon he was asked if it was Dr. Warren, and he replied that he believed it was, and the proponent's name was accordingly inserted. Under these circumstances, no sufficient evidence of a mistake in that respect is found. As the court has not been asked to construe the will on the probate, the questions which may arise in regard to the validity of the bequests to the religious and charitable

institutions named in the will must remain undisposed of here until an accounting shall be had. A decree granting probate will be entered.

In the Matter of the Probate of PORTER'S WILL.

(Surrogate's Court, Westchester County, Filed January, 1893.)

WILL—PROBATE—SERVICE OF CITATION ON NON-RESIDENTS.

Personal service of a citation on non-residents within the State thirty days before the return day is insufficient.

Petition for the probate of decedent's will. It appeared that two persons interested in the proceedings were non-residents of the State, and service of citation was ordered to be made either personally without the State or by publication. The service was made personally, however, within the State, thirty days before return day.

John F. Lambden, for petitioner.

COFFIN, S.—The question as to the proper service of the citation is jurisdictional. Section 2520 of the Code provides that, "except where special provision is otherwise made by law, service of a citation within the State" must be made upon a person at least eight or fifteen days, according to the place of service, before the return day, personally, or by leaving a copy at his residence, etc. Sections 2522, 2524, direct the mode of service upon a non-resident of the State, which is by publication for six weeks, or at the option of the petitioner, by personal service, without the State, at least thirty days before the return day. This case then comes within the exception mentioned in section 2520, and renders a service of the citation in this manner under that section void. That section only prescribes the mode of service upon residents. The other sections, *supra*, prescribe the manner of service upon a non-resident of the State, and, as none

other is provided, unless so served, the court fails to obtain jurisdiction of the person. The object of the statute is undoubtedly afford the person served time to make his arrangements to attend on the return day. It is his right, and, residing out of the State, if personal service be made upon him within the State eight, fifteen or thirty days before the return day, it is a failure to comply with the statute, as well as the order directing the mode of service. Had the petitioner here filed admissions of due service by these non-residents, or had they appeared in person, making no objection, or had a duly executed and acknowledged waiver of the issuing and service of the citation upon them been presented within the petition, and the fact stated therein, the difficulty would have been obviated. In the latter case there would have been no necessity for an order of service by publication. As there must be proof of due service of the citation upon all of the persons entitled thereto, or such service be obviated in one of the modes indicated above before the examination of the subscribing witnesses can be proceeded with, this matter must stand over until all of the parties are properly before the court.

In the Matter of the Application of MARY B. WILL, Executrix,
for Leave to Sell Real Estate.

(Surrogate's Court, Essex County, Filed March, 1893.)

GUARDIANS—LIABILITY OF ESTATE OF, FOR PROPERTY OF WARD.

The mere fact that a guardian in a foreign country had several years before possession of property of his wards, is not of itself sufficient to establish a claim in favor of the wards against the guardians' estate in a proceeding taken by creditors to sell real estate for the payment of debts. Before such a claim can be established, either the property or the proceeds thereof must be traced to the specific property sought to be sold, or else the liability of the guardian must be fixed by an accounting had in some court having jurisdiction.

Application for leave to sell real estate for the payment of debts.

B. B. Bishop, for petitioner; F. A. Smith, for James Will, tutor of infant parties; P. J. Finn, W. H. Carr and W. T. Foote, Jr., special guardians.

MCLAGHLIN, S.—Charles Will, in or about 1870, married Rebecca Anderson. Rebecca died in 1880, and at the time of her death resided in Canada. She left her surviving Alexander, David, Arthur, John and Elizabeth T., the only issues of such marriage, all of whom were, at the time of her death, under the age of fourteen years. Shortly after her death, the father, Charles Will, made application, and was appointed, under the Canadian statutes, tutor (corresponding under our statute to general guardian) of all the infants, and as such tutor, in September, 1881, he made and filed an inventory of the property left by his wife, Rebecca, and belonging to his wards. This inventory shows that at the time of her death she was possessed of personal property of various kinds and an interest in certain real estate in Canada, the possession of which, at the time the inventory was made, was passed over to the tutor. By this inventory the tutor agreed "to represent the same when and where duly required." Shortly after the filing of the inventory, and during the same year, Will married the petitioner herein, and removed with her and the children above named from Canada to Essex County, this State. Two children were born of the second marriage, Mary B. and James R. Will. Charles Will died about January 1, 1888, and left him surviving his widow, Mary B., the petitioner herein, and all the above-named children. At the time of his death he was the owner and in possession of certain real estate situate in the County of Essex, N. Y., and which real estate is now sought to be sold for the payment of his debts, his personal property being insufficient for that purpose. After the death of Will his last will and testament was admitted to probate by the surrogate of this county, and letters testamentary thereon issued to the petitioner herein on the 20th of February, 1888. She immediately entered upon

the discharge of her duties, filed an inventory of his estate, and on September 7, 1888, commenced the publication of a notice for the creditors to present claims, which notice was published as required by law. In pursuance of such notice a large number of claims were presented. The personal property was disposed of, and some time during the year 1890 she made application to this court for judicial settlement of her accounts as such executrix, and a final decree was entered in August of that year. The personal property left by the deceased was insufficient to pay his debts in full, and the decree directed that the moneys in the hand of the executrix at the time of such final settlement be paid *pro rata* among the creditors thereof. Among other creditors of the estate was the petitioner herein, and this proceeding is instituted by her for the purpose of selling the real estate owned by the deceased at the time of his death for the payment of his debts. Upon the return of the citation herein, James Will, who, after the death of Charles, was appointed tutor in Charles' place, under the Canadian statutes, of the children of the first wife, appeared and presented a claim as such tutor against the estate of Charles Will, amounting, besides interest, to the sum of \$1,400; and the only question difficult of solution is whether such claim can be allowed as a valid claim against the estate of Charles Will, deceased.

Assuming that all the evidence offered in support of such claim is admissible, which is by no means clear, I am of the opinion that the claim cannot be allowed. It is unquestionably the law that an action on the bond of a guardian or administrator will not lie against the sureties until there has been an accounting by the guardian or administrator, or, in case of death, by the personal representatives. *Hood v. Hood*, 85 N. Y. 561; *Girvin v. Hickman*, 58 How. 244. In other words, no action will lie against the sureties until there has been some judicial determination, in a direct proceeding taken for that purpose, fixing default on the part of the principal. I see no reason why this rule is not applicable to the case at bar. There

is here no proof that any accounting has ever been made, either by Charles Will, as tutor, or, after his death, by his personal representative or successor, James Will. There is no presumption that the property mentioned in the inventory signed by Charles was converted by Charles to his own use, or that the proceeds of that property went into the real estate subsequently purchased by him, and now sought to be sold. On the contrary, the presumption is that Charles did his duty as tutor, and did not convert such property to his own use, and at the time of his death held such property as tutor, or had previously accounted therefor. There seems to me to be an insurmountable objection to the allowance of this claim until there has been some judicial determination, fixing default on the part of Charles as tutor, either under the Canadian jurisdiction or in our own courts. The inventory itself, relied on by the claimant as showing the receipt by Charles, as tutor, of property belonging to the infants, would seem to indicate that such course was absolutely necessary before proceeding against the decedent's estate. The condition upon which he received the property as tutor was that he would "represent the same when and where duly required." Has he been required to represent [return] it? If so, when? Where? To whom? The present tutor, James, was appointed in 1888. Has he, as tutor, received this property, or any part of it? Although present in court, he was not sworn as a witness, and there is absolutely no light thrown upon the question as to what has become of the property of these infants by him. It can hardly be assumed that the laws of a foreign country would permit property belonging to infants to pass beyond its jurisdiction without at least requiring an accounting or security of some kind. Clearly, as against the creditors and others interested in this estate, it cannot be assumed that the deceased took the property of the infants, and converted it to his own use, or used the same in purchasing the real estate in question.

The wisdom of the rule requiring the principal to account before proceeding against a surety, or before proceeding against a principal's estate, in case of death, is well illustrated in the

case at bar. All of the evidence given in favor this claim may be true, and yet all of the property mentioned in the inventory filed by Charles Will, deceased, may have been turned over to his successor, James Will, immediately upon James' appointment. James may still have all of that property, or all of it may stand to the credit of or in the name of the infants. It will not do to permit claims to be established against a decedent's estate by such evidence. The mere fact that a guardian in a foreign country had several years before possession of property of his wards is not of itself sufficient to establish a claim in favor of the wards against a guardian's estate in a proceeding taken by creditors to sell real estate for the payment of debts. Before such a claim can be established, either the property or proceeds thereof must be traced to the specific property sought to be sold, or else the liability of the guardian must be fixed by an accounting had in some court having jurisdiction. In *Hood v. Hood*, 85 N. Y. 561, it appeared that the executor had received certain property, but the court held that that fact alone was not of itself sufficient to establish liability without an accounting. See, also, *Matter of O'Brien*, 45 Hun, 284, 10 St. Rep. 414. The evidence fails to satisfy me that the claim presented by James Will, as tutor, is a valid claim against the estate of Charles Will, deceased; and an order can be entered to that effect, and directing a sale of the premises in question for payment of claims allowed; order to be settled on notice. On settlement of order question of costs will be considered. Order accordingly.

In the Matter of the Judicial Settlement of the Accounts of
HENRY JONES, Executor.

(Surrogate's Court, Westchester County, Filed January, 1893.)

**EXECUTORS AND ADMINISTRATORS—ACCOUNTING—CLAIM BY EXECUTOR
AGAINST ESTATE.**

On the judicial settlement of the accounts of an executor or administrator he may prove any debt due to him from the decedent, but not one due to himself and others.

Judicial settlement of accounts.

F. T. Lee, for executor; W. Thompson, for contestants.

COFFIN, S.—The executor claims a balance of account of \$2,000 against the deceased, growing out of dealings and transactions between the latter and the copartnership firm of Jones, Hall & Co. That firm was composed of Henry Jones, the executor, Thomas Hall and William Edgar. The other members of the firm are interested in this claim. It is therefore a claim of the firm, and not of the executor, and is contested by the legatees, Mrs. Martin and Mrs. Gage. Much of the evidence taken relates to items of the account resulting in the balance claimed.

Nothing is better settled than that this court can try and determine the disputed claim of an executor or administrator on his accounting, and that it cannot so try and determine the disputed claims of other creditors. In the case of *Shakespeare v. Markham*, 72 N. Y. 400, it was held, before the adoption of the eighteenth chapter of the Code, under 2 Rev. Stat. 88, section 33, that “this section must necessarily refer to all claims in which an executor is interested, and the circumstance that he is jointly interested in a demand, or owns a portion of that in which he has an interest by assignment, does not affect the authority of the surrogate to adjudicate in regard to it.” There he did own a portion of the claim, and had paid the other joint owners their shares previous to the accounting, and thus became subrogated to their rights, and was regarded as their assignee. Hence it would seem that the dictum “that where he is jointly interested in a demand” the surrogate has jurisdiction to adjudicate it may justly be regarded as *obiter*. I have great respect for the learning of the able jurist who delivered the opinion in that case, and have grave doubts as to whether he considered this immaterial point with the accustomed acumen displayed by him upon any material matter. Indeed, it is plain that his attention was given solely to the facts of that case upon this point, for he says: “As he, the executor, was entitled

to have his interest determined, it does not deprive him of that right, because he has procured a transfer of other rights." And again, in closing, upon this branch of the case, he says: "I am unable to discover any reason why the surrogate should not try and determine the question as to the claim of the appellant." Let us see into what difficulties we might be led by following the dictum referred to. A surrogate can only decree the payment to an executor of what he may find due to him. Now, in this case, about \$2,000 is claimed to be due from the deceased to three persons composing the firm; one of them being the executor, and the others mere creditors. Shall the decree award the whole sum to the executor, to the exclusion of the other members of the firm, or shall he decree an equal division among the three? But they may not be equally interested, and may differ among themselves as to their respective rights. Must this court then hear and adjudicate their respective interests, and so assume burdens that do not properly belong to it, and over which no statute gives it jurisdiction? The Revised Statutes, *supra*, provide that "no part of the property of the deceased shall be retained by an executor or administrator in satisfaction of his debt or claim until it shall have been proved to, and allowed by, the surrogate." The provision of the Code, section 2739, leaving the above section unrepealed, is that "upon a judicial settlement of the account of an executor or administrator he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the Surrogate's Court." These provisions clearly contemplate a debt of which the executor or administrator is sole owner, or solely owes, and, if the former, when established, must be followed by a decree directing the payment or allowance thereof to him, and not to him and others.

Had Hall and Edgar assigned their interest to the executor before these proceedings were commenced, then the case would have fallen within the principle decided in *Shakespeare v. Markham*, 72 N. Y. 400. Surrogate Rollins, in the case of *In re Eisner*, 5 Dem. 383, recognized, without much apparent consideration, the validity of the dictum in the case above criticized as applicable to every case where a claim of a firm of which the executor is a member is involved. To this I find myself unable to yield assent. It will not do to say there is no other mode provided by which such a claim may be determined. The doors of equitable jurisdiction of superior courts are wide enough to admit, and then entertain and adjudicate, such a claim. But the necessity of a resort to such a court may be readily obviated. The executor may pay the firm (he would not be likely to dispute its claim) and, on filing a voucher therefor, ask credit for the amount on the accounting. He will not thus violate the statute, which forbids him to retain property of the estate in satisfaction of his debt, and on such accounting any interested party may question the propriety of the act of payment. He may show, for instance, that the claim of the firm was barred by the statute of limitations, or that the amount paid was more than was actually due. The surrogate will not thus be trying what is known to the statute as a "disputed claim," which is one disputed by the executor, but simply testing his act in paying an alleged debt of the deceased, which is claimed not to be a proper charge against the estate. The statute, as is well known, allows the executor to prove before the surrogate a debt due to him. This is not a debt due to him, and it is not an incident of such power, which the surrogate may exercise, to allow the proving of a debt due to him and others. That would be to exercise a chief, and not an incidental, power.

4 The objection of the contestants is, therefore, sustained.

In the Matter of the Judicial Settlement of the Accounts of
MILLARD F. ONDERDONK, Executor of EDWARD D. HESDRA,
Deceased.

(Surrogate's Court, Rockland County, Filed June 19, 1893.)

1. SURROGATE'S COURT—DECISION—FINDINGS.

An irregularity in the decision of a surrogate by reason of its failure to state separately the facts found and conclusions of law is waived by a failure of the aggrieved party to take an appeal and avail himself of his rights under section 2545 of the Code.

2. SAME—LACHES.

Motion to vacate the decree on the ground of a failure to file findings of facts and conclusions of law cannot be made after the expiration of one year.

Motion to set aside the decree settling the executor's accounts.

Snider & Hopper, for executor; Charles S. Dunham, for creditors; L. Napoleon Levy, for legatee; George S. Wyre, for legatee and devisee.

WEIANT, S.—This is a motion to vacate and set aside a decree made in the above entitled proceeding on November 6, 1891, adjusting and judicially settling the accounts of the executor, on the ground that the surrogate failed to file in his office his decision in writing, stating separately the facts found and the conclusions of law, in compliance with the requirement of section 2545, Code Civil Procedure. It is true that, while a written decision was filed by the surrogate, yet it did not separately state the facts and conclusions found. Two objections are advanced, waiver of the irregularity, if any; and want of power in the court to grant relief at this late day, either of which is sufficient to defeat this motion. First, it would seem that the moving party has waived the irregularity, if any, by his own failure to take an appeal and avail himself of his rights under section 2545 of the Code as to findings, requests to find, and

exceptions. In *Matter of Hood*, 104 N. Y. 103-106, 5 St. Rep. 501, Judge FINCH, writing the opinion, says, in answer to the suggestion of counsel that, in the absence of requisite findings, the decree is irregular:

"That does not follow. It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue. If he suffers this necessary step to be omitted he will find himself without the means of reviewing the rulings to which he complains." The second objection is well taken. It is now too late to obtain the relief sought. "A motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year since the filing of the judgment roll." Code, sections 724, 1282; *Corbin v. Westcott*, 2 Dem. 559; *Hood v. Hood*, 5 id. 50; *Matter of Filley's Estate*, 47 St. Rep. 428; *Matter of Post*, 38 id. 1; *Matter of Foulks' Estate*, 10 N. Y. Supp. 515. A Surrogate's Court has power "to open, vacate, modify, or set aside" its decrees or orders. Code, section 2481, subd. 6. But "the powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers." Id.; *Matter of O'Neil*, 46 Hun, 500, 12 St. Rep. 419; *Matter of Carr v. Estate of Tompkins*, 46 id. 585; *In re Filley's Estate*, 47 id. 428. Thus it appears that sections 724, 1282, are specifically made applicable to Surrogates' Courts, and the time within which the motion could have been made has expired. *Corbin v. Westcott*, *supra*; *In re Hood*, *supra*; *In re Tilden*, 98 N. Y. 434-442; *In re Foulks' Estate*, *supra*. Even if it be assumed that it is an irregularity for the surrogate to fail to make and file such a decision with such statement of facts and conclusions of law, and the court had the power to hear the motion, yet it is not an absolute right of a complaining party to have the decree made and entered set aside. *Hood v. Hood*, 5 Dem. 50. Upon the merits, even if the power existed, it is clear, within the authorities, that the motion should not be granted because of the laches of the applicant. "Where

a party has had his day in court he must show that it was not his fault that he did not improve it before he can get another day on the same matter." *In re O'Neil, supra; In re Filley's Estate, supra.*

The motion is accordingly denied, with ten dollars costs.

In the Matter of the Disposition of the Real Estate of the Estate of STILMAN B. SANDERS, Deceased, for the Payment of his Debts.

(*Surrogate's Court, Herkimer County, Filed May 15, 1893.*)

1. LIMITATION—PAYMENT.

A payment, in order to have the effect of a renewal of the obligation or an extension of the time in which an action may be brought, must be made by the party who is sought to be held; not necessarily in person, but by him or by his agent authorized to do that act for him, so that it is his payment.

2. SAME—SURETYSHIP.

A note made by the decedent and one P. was given to the aunt of the latter to raise money to pay off a prior note made by P. and indorsed by decedent. All the payments on such note were made by P., who made all the indorsements. Decedent at one time asked to be allowed to take his name off, which the payee refused, but expressed no surprise, and decedent said that he would see that it was paid, and that P. had made enough on the place to have paid it. *Held*, sufficient to show that the payee understood that decedent was only a surety.

3. SAME.

It was claimed that a delivery of hay by P. was a payment by decedent on the note. The evidence showed that on the payee sending for hay, decedent said that P. was away, and that when he returned the payee could have it; that subsequently on examining the note he expressed surprise that the hay was not indorsed thereon, and the payee replied that she and P. were in the habit of letting their accounts run and indorsing them in one indorsement. P. testified that all the hay delivered was his property. *Held*, that a payment by decedent or by P., as his agent, was not shown.

Upon the return of citations Hudson B. Farrington appeared and presented a claim to be proved against the estate based upon

a promissory note assigned to him by the payee, Madeline Harter, which was dated March 8, 1875, for \$1,200, executed by Thomas R. Petrie and Stillman B. Sanders, payable one year after date, with interest, and was the joint and several note of the said makers. Sanders died September 18, 1890. Thomas R. Petrie and Marietta S. Gardner were appointed administrators of his estate on October 9, 1890.

The administrators interpose the statute of limitations as a defense to the claim against Sanders' estate.

On January 1, 1887, Thomas R. Petrie delivered to Madeline Harter, to be applied as a payment on the note, 1,235 lbs. of hay of the value of \$8.02, and the claimant asserts that this payment was made by Petrie as the agent of Sanders, by Sanders' direction, and was a payment by Sanders upon the note, and that by such payment Sanders renewed his obligation on the note.

J. A. & R. E. Steele, for claimant; Steele & Prescott, for administrators.

SHELDON, S.—It is well settled that one of the joint and several makers of a promissory note cannot, by his own act in making a payment thereon, postpone or avoid the bar of the statute of limitations as to the other makers, and this is so whether the one making the payment is the principal debtor and the other makers are sureties, or whether the surety makes the payment. In any case a payment, in order to have the effect of a renewal of the obligation or an extension of the time in which an action may be brought, must be made by the party who is sought to be held, not necessarily in person, but by him or by his agent authorized to do that act for him, so that it is his payment. *First National Bank of Utica v. Ballou*, 49 N. Y. 155; *Littlefield v. Littlefield*, 91 id. 203.

In the case last cited it appeared that the holder of a joint and several note long past due went to one of the makers, who was a surety for the other maker, and in substance asked for payment. The surety asked the holder to wait until the maker

came home and sent the principal maker a message by the holder saying, "Tell him for me that he must pay the interest and as much of the principal as he can; and that I say so." The principal maker came home, and the holder delivered the message as directed, and some months afterward the principal made a payment on the note and afterwards told the surety of making the payment and the surety said that it was all right. It is clear that the effect of the acts of the parties was not otherwise than as though the surety had gone to the principal maker of the note and said to him "You must make a payment on that note; pay the interest and as much of the principal as you can;" in pursuance of this direction the principal maker makes a payment upon the note, and soon after informs the surety of it, and the surety says "All right; that is what I told you to do." Such a payment is one made with the knowledge and approval of the surety, and in one sense by the direction of the surety, for he instigated the payment, he set the maker in motion, and directed him to make the payment and the payment inured to the benefit of both principal and surety in the reduction of the debt, and if such payment was the joint act of principal and surety it would be a payment by the surety, and he could not avail himself of the statute of limitations until six years thereafter, but such payment cannot be held to be the joint act of principal and surety; the principal makes the payment out of his funds; he is only discharging his obligation both to the holder of the note and to the surety; the surety in urging the principal to make a payment was only urging him to do his duty. It is competent for the surety to direct the maker to make a payment as the act and payment of both, although made with the means of the principal, and if so made, it will have the same effect as though made personally by the surety, but to establish such a payment the proof must be clear and unequivocal. In a case where the makers of a joint and several note were equally liable as between themselves, and one of the makers had upon the request and direction of the others made a payment upon the note, or in a case where the surety made a payment upon the re-

quest of the principal maker of the obligation, there is ground for contention that such payment is the joint act of the one requesting and the one making the payment, because the principal maker, who requests and induces the surety to make a payment, is thereby discharging his own duty, and contracting a fresh obligation to the surety for the money advanced by the surety to make the payment for the principal.

In the application of these principles to the case in hand, I will first consider in what relation to the other maker of the note was Stillman B. Sanders. It is clearly shown that, at the date of the note, Petrie was the maker and Sanders one of the indorsers of a note held by William Reynolds, upon which there was due \$1,765, upon which Petrie was the principal debtor, and Sanders was surety, and that the consideration of the note in suit was \$1,200 furnished by Madeline Harter, the payee, to pay off the Reynolds note. I think it must be found as a fact that Madeline Harter knew of the fact that Petrie had the benefit of the \$1,200, and that as between themselves Sanders was only surety for Petrie upon the note. Miss Harter was Petrie's aunt. Petrie testifies that before getting the money he had talked with Miss Harter about it, and told her that he was paying Reynolds a *bonus* for the use of his money which he wished to get rid of, and this testimony is not contradicted. Reynolds was paid at Newport, and Miss Harter went to Newport on the day of the payment with either Sanders or Petrie to furnish the \$1,200. In support of this finding some weight must be given to the fact that Petrie personally attended to making the payments. None of the indorsements are in Sanders' handwriting; and all, except one made by Miss Harter, are in Petrie's writing; there is no dispute but that nearly all the payments of interest were made by Petrie with his own funds. The fact, as testified to by Mary A. Farrington, the wife of the claimant, that in the spring of 1887 Sanders asked Miss Harter to allow him to take his name off the note, and her reply refusing, but without surprise at such request, and Sanders' remark following in the same conversation that he should

see that it was paid; that Petrie could have made enough on the place to have paid it long before now, but that she should have her pay, and that he considered that and one other as sacred, and that these were all that he was holden for; all this indicates a mutual understanding between Miss Harter and Sanders that Sanders was only a surety on the note.

I think it must also be found that the hay delivered to Miss Harter January 1, 1887, to apply on the note was the property of Petrie, and that Miss Harter so understood it. Petrie testified that about the year 1871 he made an oral agreement with Sanders, whereby he was to give Sanders \$100 a year and his support for the use of the farm, and that he occupied the farm under that agreement down to 1890.

There was no direct contradiction of Petrie's testimony in this respect, and he testified also directly that all the hay delivered to Miss Harter, as well as the other products of the farm delivered to her, all of which was applied upon the note in question or upon other notes of Petrie's held by her, was his property. Now, what is the testimony relied upon to show that Sanders, the surety, made a payment upon the note by Petrie as his agent with and by means of the load of hay, which was Petrie's property?

Varnum S. Farrington, called as a witness, in behalf of the creditor, testified that at the request of Miss Harter he delivered a message from Miss Harter to Sanders as follows: "I told Mr. Sanders that Miss Harter, or Lainy, wanted him to send her some hay for her cows, and he said that Petrie was not at home, and when Petrie came home he would send the hay to her."

Mary A. Farrington, the wife of the creditor, was called as a witness in his behalf and gave testimony concerning a conversation between Sanders and Miss Harter in the spring of 1887 at her house, as follows: "They talked for some time about church matters; then he asked if the interest had been paid on the note, and she replied, not all of it; he then asked if she had any objections to his seeing that note of his and Petrie's; she

quest of the principal maker of the obligation, there is ground for contention that such payment is the joint act of the one requesting and the one making the payment, because the principal maker, who requests and induces the surety to make a payment, is thereby discharging his own duty, and contracting a fresh obligation to the surety for the money advanced by the surety to make the payment for the principal.

In the application of these principles to the case in hand, I will first consider in what relation to the other maker of the note was Stillman B. Sanders. It is clearly shown that, at the date of the note, Petrie was the maker and Sanders one of the indorsers of a note held by William Reynolds, upon which there was due \$1,765, upon which Petrie was the principal debtor, and Sanders was surety, and that the consideration of the note in suit was \$1,200 furnished by Madeline Harter, the payee, to pay off the Reynolds note. I think it must be found as a fact that Madeline Harter knew of the fact that Petrie had the benefit of the \$1,200, and that as between themselves Sanders was only surety for Petrie upon the note. Miss Harter was Petrie's aunt. Petrie testifies that before getting the money he had talked with Miss Harter about it, and told her that he was paying Reynolds a *bonus* for the use of his money which he wished to get rid of, and this testimony is not contradicted. Reynolds was paid at Newport, and Miss Harter went to Newport on the day of the payment with either Sanders or Petrie to furnish the \$1,200. In support of this finding some weight must be given to the fact that Petrie personally attended to making the payments. None of the indorsements are in Sanders' handwriting; and all, except one made by Miss Harter, are in Petrie's writing; there is no dispute but that nearly all the payments of interest were made by Petrie with his own funds. The fact, as testified to by Mary A. Farrington, the wife of the claimant, that in the spring of 1887 Sanders asked Miss Harter to allow him to take his name off the note, and her reply refusing, but without surprise at such request, and Sanders' remark following in the same conversation that he should

see that it was paid; that Petrie could have made enough on the place to have paid it long before now, but that she should have her pay, and that he considered that and one other as sacred, and that these were all that he was holden for; all this indicates a mutual understanding between Miss Harter and Sanders that Sanders was only a surety on the note.

I think it must also be found that the hay delivered to Miss Harter January 1, 1887, to apply on the note was the property of Petrie, and that Miss Harter so understood it. Petrie testified that about the year 1871 he made an oral agreement with Sanders, whereby he was to give Sanders \$100 a year and his support for the use of the farm, and that he occupied the farm under that agreement down to 1890.

There was no direct contradiction of Petrie's testimony in this respect, and he testified also directly that all the hay delivered to Miss Harter, as well as the other products of the farm delivered to her, all of which was applied upon the note in question or upon other notes of Petrie's held by her, was his property. Now, what is the testimony relied upon to show that Sanders, the surety, made a payment upon the note by Petrie as his agent with and by means of the load of hay, which was Petrie's property?

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died ; and that she had always lived at home with her father and mother ; and that her father was a farmer ; that about 1881 she saw her father pay her mother some money ; and that at the time of the indorsement of May 1, 1890, she saw her father write the indorsement on the note and hand it back to her mother and say : "There, the note is all right now ; my indorsement makes it all right." The foregoing was upon direct examination. Upon cross-examination she testified respecting the payment made about 1881 : "I do not know the amount ; I saw the money ; I do not remember the denomination of the bills ; all I mean about that transaction is, that in 1881 I saw my father hand my mother some money ; I cannot say there was more than two bills ; I cannot say I recollect of seeing distinctly more than one ; during all the years of which I have testified my father and mother were living together, and my father furnished the money for the usual wants of the family."

Upon re-direct she testified : "In 1887 or 1888 I saw my father pay my mother money, and I think in 1889. I am able to swear positively that at various times in 1887 and 1888 I saw my father pay my mother money." Upon re-cross examination she testified : "I saw him pay her money in 1890 on several occasions ; I mean by pay, hand her money. On a few occasions I saw her buy articles with the money handed to her ; I could not say whether the sums were large or small. I do not know that there were seasons of the year when he gave her money more frequently than others. It was about as frequent through the years one with another. I remember one occasion when something was said. I think it was later than 1879. I cannot give the date. I have given all that I remember of what was said when the last indorsement was written. I did not see my father hand my mother any money on this occasion. My mother produced the note. The indorsement having been made, my father re-delivered the note to my mother. I did not see any other paper there. I had been with my mother nearly all the day. I did not see at any time any money paid by father to mother that day."

Ordinarily the mere fact that money is delivered by one person to another raises a presumption that the money was delivered in payment or to apply in satisfaction of an obligation previously incurred. *Bradner v. Fitzhugh*, 4 W. Dig. 516.

But such a presumption is by no means conclusive, and its strength must depend upon circumstances. When the delivery of money is from husband to wife or from father to child the presumption that the delivery of the money was in payment of a debt will not arise. This case is similar to that of the rendition of services, concerning which, in the leading case of *Williams v. Hutchinson*, 5 N. Y. 317, PRATT, J., says: "Under certain circumstances, when one man labors for another a presumption of fact will arise that the person for whom he labors is to pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case and the ordinary dealings between man and man. But where the services are rendered between members of the same family no such presumption will arise." The deliveries of money by decedent to his wife are not proved to have been made under such circumstances as to lead to any other inference than that they were made to supply ordinary domestic wants.

The witness by whom these receipts of money from decedent by the claimant was proved appeared entirely candid and truthful; and from the interest in favor of the claimant which her natural affection as a daughter would inspire it may well be supposed that all the facts which she could give tending to show payment were given in evidence. The situation of the witness was such that it is difficult to suppose that payments or any payment upon the note was made without the daughter hearing anything said upon the subject between her father and mother. The fact that nothing was said at the time of the indorsement, or at any other time, so far as appears, about a payment on the note, and that the actual payment first attempted to be proved as the payment for which the indorsement was made was stated to have been made in 1881, and that all the alleged deliveries of money

by decedent to the claimant were for domestic purposes probably, and not payments upon the note, and that the attempt of the claimant to show actual payment upon the note, aside from the force of the indorsement, has failed, leads to the conclusion, which is also supported by what was said by the decedent at the time of making the indorsement, that the decedent and claimant agreed to have the indorsement put upon the note, not as evidence of any payment ever actually made, but acting under the impression that the indorsement would, of itself, renew the note, and save it from the operation of the statute of limitations.

The literal meaning of the words used by the decedent, accompanying his indorsement, express the idea that the indorsement alone made the note all right; he said "There, the note is all right now; my indorsement makes it all right."

Taking all the evidence into consideration, the conclusion is reached that the claimant has not successfully sustained the burden of proving a payment upon the note May 1, 1890, or at any time within six years prior to the death of Dennis L. Clapsaddle.

The contesting creditor also raises the objection that the administrator is required, but has omitted, to present the affidavit which the administrator may require each creditor to present in support of his claim, viz., "that such claim is justly due; that no payments have been made thereon; and that there are no offsets against the same to the knowledge of such claimant." That a claim in favor of the administrator shall not be deemed proved and may not be allowed by the surrogate unless the affidavit is made and presented is held by the following authorities: *Williams v. Purdy*, 6 Paige's Ch. 166; *Clark v. Clark*, 8 id. 159; *Terry v. Dayton*, 31 Barb. 519; *Wood v. Rusco*, 4 Red. 384.

The affidavit presented by the administratrix was defective in not stating that no payments had been made on the claim.

The rule makes a requirement in excess of the demands of the statute, and compels a creditor who happens to be the ad-

ministrator to do an act that, if omitted by an ordinary creditor, would not bar a recovery by action or upon a reference under the statute of his demand. The rule seems a technical one, but if there be reason for requiring the affidavit, there is the same reason for requiring that the affidavit should conform to the rule, and not only state that the claim is justly due, and that there are no off-sete against the same to the knowledge of the claimant; but that no payments have been made thereon. Upon the authority of the cases cited I am constrained to hold that this ground of objection is also well taken, and that for the reasons stated the claim must be disallowed.

In the Matter of the Judicial Settlement of the Accounts of
BRIDGET LUCY *et al.*, Administrators of CORNELIUS D. LUCY,
Deceased.

(*Surrogate's Court, Herkimer County, Filed July 11, 1893.*)

TENANTS IN COMMON—USE OF PROPERTY FOR COMMON PROFIT.

If, by agreement between tenants in common, the common property is used for the purpose of making a profit, either tenant in common may have an accounting in equity of the rents and profits and disbursements, and the tenant to whom there is found a balance due will have an equitable lien upon and right to reimbursement out of the share of the common property from which such balance is found due.

2. SAME—RIGHT TO REIMBURSEMENT FROM ESTATE OF CO-TENANT.

The owners of a farm agreed that one of them should carry on a dairy and general farming business thereon, the products to be divided between them in a certain manner. The business was so carried on until the death of the one conducting it, who received the moneys from sales and mingled the same with his other money, and the other tenant received nothing. The estate proved insolvent. *Held*, that the co-tenant was entitled to be paid in full for his share of the profits out of the moneys so received, and, if necessary, out of the proceeds of any property owned by the parties in common and used in the business, and that only so much as remained after such payment should be considered assets for the payment of general creditors.

On January 1, 1891, Ambrose Arnold and Cornelius D. Lucy were the owners as tenants in common, each owning an undivided half of a farm of 160 acres, and a dairy of 40 cows upon it, situated in the town of Fairfield, N. Y. On or before January 1, 1891, Arnold and Lucy entered into an agreement that Lucy should, during the year 1891, carry on and conduct dairy and general farming business with the said farm and dairy, and that Arnold should have three-tenths, and Lucy should have seven-tenths, of the products of the farm. The principal product of the farm was cheese, and by agreement the milk produced from the dairy of the farm was taken to a cheese factory, and with the milk of many other patrons of the factory made into cheese, which cheese, after being cured, was sold by the salesman of the factory, and the money received for it checked out to the patrons in proportion to amount of milk contributed. The milk from the farm of Arnold and Lucy was credited at the factory by consent to Lucy, and the proceeds paid to him during his life, and after his death to his administrators.

Lucy carried on the farm business from January 1, 1891, to the time of his death, which occurred October 17, 1891, and after his death his widow, Bridget Lucy, on November 2, 1891, was, with John C. Murphy, appointed administrator of Lucy's estate, and the administrators carried on the farm business to January 1, 1892.

Of the products of the farm, aside from cheese, a portion was sold by Lucy, and the remainder by the administrators, and none of the moneys received from the business were kept separately from other moneys, either by Lucy or the administrators; and nothing has been paid to Arnold on account of his share in the product of the farm. The amount of money received by Lucy in his lifetime from sales of cheese by the factory was \$577.93; from sale of butter was \$50, from sale of pigs and pork was \$40, from sale of calves was \$44. After Lucy's death, his administrators received from sales of cheese made by the factory from milk taken to the factory before the death of Lucy, \$225.31, and from milk taken to the factory after the death of Lucy, \$182.56.

The administrators also received from sale of butter from the farm, \$10, and from sale of pigs and pork, \$39.

At some time during the year 1891 Lucy sold a bull from the dairy which was owned equally by Arnold and Lucy, and received the price, which was \$25. In 1892 Ambrose Arnold died, and Thomas Arnold was appointed administrator of his estate. At the time of Lucy's death the money found in his possession was only \$100. The first money received from the cheese factory by the administrators was \$90, received by Mrs. Lucy and paid out by her. The other cheese, butter and pork moneys, received by the administrators, was mingled with the moneys received from sale of cows, horses and farming implements, etc. Part of the debts, the funeral expenses and expense of administration have been paid from this fund by the administrator.

On July 30, 1892, Nathan B. Arnold recovered a judgment against the administrators in the Supreme Court for the sum of \$4,771.41, to be paid in due course of administration out of the assets. This proceeding is the final accounting of the administrators, and the foregoing facts have been stipulated by all parties, except those in default, and the same parties have stipulated to waive all question of jurisdiction of the surrogate to determine the questions presented.

The administrator of the estate of Ambrose Arnold claims that three-tenths of the proceeds of the farm products, viz.: \$350.64, should be paid in full. This claim is controverted by Nathan B. Arnold, who contends that it must be treated as an ordinary debt, to be paid ratably with the other debts against the decedent.

P. H. McEvoy, for administrators; R. H. Smith, for Nathan B. Arnold; A. M. Mills, for administrator of Ambrose Arnold.

SHELDON, S.—It is well settled that a tenant in common of either personal or real property may have an action against his co-tenants in a court of equity for a partition of the common property, and if the interests of the parties require it such partition will be made by a sale of the property and a division of

the proceeds. *Tinney v. Stebbins*, 28 Barb. 290; *Tripp v. Riley*, 15 id. 334; *Andrews v. Betts*, 8 Hun, 325; *Shehan v. Mahar*, 17 id. 130; *Prentice v. Janssen*, 7 id. 86; *Smith v. Smith*, 10 Paige, 470.

Where one tenant in common has the occupation and enjoyment merely of the whole of the common property, without any agreement with his co-tenants, express or implied, to render any thing for the use, and receives nothing in the nature of rents and profits from the use of the property, he cannot be called upon by his co-tenant to account or pay for the use and occupation, but if he receives rents and profits he may be called to account for them in an action for partition. *McCabe v. McCabe*, 18 Hun, 154; *Scott v. Guernsey*, 48 N. Y. 124.

And such rents and profits are upon partition a lien upon the share of him from whom they may be due. *Scott v. Guernsey*, 48 N. Y. 124.

If one tenant in common, with the assent of the other, lays out his money in repairs or improvements upon the common property, or if by agreement the common property is used for the purpose of making a profit, either tenant in common may have an accounting in equity of the rents and profits and disbursements, and the tenant in common to whom there is found a balance due will have an equitable lien upon and right to reimbursement out of the share of the common property from whom such balance is found due. *Green v. Putnam*, 1 Barb. 500; *Prentice v. Janssen*, 7 Hun, 86; *Dyckman v. Valiente*, 42 N. Y. 564; *Mumford v. Nicoll*, 20 Johns. 634; *Willard's Eq. Jur.* 106; *Wright v. Wright*, 59 How. 186.

The reason of the rule is well stated by MERWIN, J., in the case last cited, as follows: "The increase or rents are common property as much as the principal or the original estate. When one, therefore, takes of the increase or rents, he takes a part of the common fund or property; and it may well be said that there is an implied agreement to have what he has received applied on his share, or that on division he will bring it in, to the end that it may be charged to him on division, and that a court of equity works out this result through the operation of an equitable lien."

When an agreement is made between tenants in common for the use of the common property, and sharing the profits obtained from such use, the tenants in common do not become partners generally, although such relation is sometimes called a special partnership for the particular adventure. Thus, in *Mumford v. Nicoll*, before cited, Chief Judge SPENCER, who wrote the prevailing opinion, says: "I must not be supposed to overrule the distinction between partners in goods and merchandise and part owners of a ship. The former are joint tenants, and the latter are, generally speaking, tenants in common, and one cannot sell the share of the other. But I mean to say that part owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship, and if they are to be so regarded, the right of one to retain the proceeds until he is paid what he has advanced beyond his proportion is unquestionable."

The gist of the decision in *Mumford v. Nicoll* is stated as approved by FOSTER, J., in *Dyckman v. Valiente*, above cited, as follows: "And in *Mumford v. Nicoll*, 20 Johns. 611, it was held that where one of two part owners of a ship receives or gets possession of the whole funds of a vessel and of the voyage he has a right to retain them until he is paid or indemnified for what he has advanced or paid more than his share for outfits, repairs or expenses of the vessel for the particular voyage or adventure."

Although an agreement between tenants in common for the use of the common property for the purpose of making a profit or income, to be divided, may not constitute a partnership, yet after the undertaking has been commenced the rights and liabilities of the parties are to be determined upon the same principles as are applied by courts of equity to partnership transactions. *King v. Barnes*, 109 N. Y. 267, 15 St. Rep. 52; *Dyckman v. Valiente*, 42 N. Y. 551; *Wilcox v. Pratt*, 34 St. Rep. 477.

Ambrose Arnold and Cornelius D. Lucy entered into an agreement for the use of their common property, for the purpose of

making a common profit. The contracting parties carried on the business provided for until the death of Lucy, and his administrators taking his place, the business was carried on by them, with the assent of the other party to the adventure, until the completion of the enterprise. The proceeds of the business came to the hands of Lucy in his lifetime, and to the hands of his administrators after his death. The administrator of the estate of Ambrose Arnold was entitled to go into a court of equity and have an accounting with Lucy's administrators of the year's business and the proceeds of it. *Such an accounting has in effect been had*, and from it there appears to have been received by Lucy and his administrators as the proceeds of the year subject to a division the sum of \$1,168.80, of which Arnold's share was \$350.64; and it also appears that Lucy sold a bull which was owned in equal shares by Ambrose Arnold and himself as a part of the dairy, and received \$25 for it, of which \$12.50 would be properly added to the \$350.64, making \$363.14 as the amount found due the administrators of Ambrose Arnold upon the accounting. The estate of Lucy is insolvent, the amount of assets to be used in payment of debts being less than \$1,000, and the indebtedness amounting to over \$5,000. As a part of the assets there appears to have been received by the administrators over \$400 as proceeds of the farm arising from the sale of cheese, also over \$400 from the sale of Lucy's interest in the dairy owned in common with Ambrose Arnold. Such being the facts, the administrator of Ambrose Arnold claims that only such part of the proceeds of the farm and of the common property as remains after the payment of his share, viz., \$363.14, should be considered as assets applicable to the payment of general creditors.

The principal creditor, Nathan B. Arnold, resists this claim, and insists that the proceeds of the farm products, and other common property, sold by Lucy and his administrators, must be treated as though it were Lucy's individual property and as being general assets; and the amount shown to be due upon the accounting to the administrator of the estate of Ambrose Ar-

nold, as his share of the proceeds of the year's business, must be treated as an ordinary debt and only entitled to the same percentage of the assets as the other debts. I am of the opinion that there are equities founded upon the relations of the parties growing out of their undertaking for the use of the common property for the purpose of getting common profit that authorizes and requires that Ambrose Arnold's share of the profits be paid to him out of the money received from sale of the products of the farm, and, if necessary, out of the proceeds of any property owned by the parties in common and employed in the business. The learned counsel for Nathan B. Arnold asserts in his brief, upon the authority of *Taylor v. Bradley*, 39 N. Y. 129, that the contract between Ambrose Arnold and Lucy was in the nature of a partnership.

In this position I think the learned counsel is correct, and that the rights of Lucy's administrator in the common property must be determined by the rule that applies to the administrator of a deceased partner. In such a case, the administrator takes or retains, as assets, only such a part of the common property as may be found due after an adjustment of the partnership accounts upon equitable principles. *Thomson v. Thomson*, 1 Bradf. 24; *Hooley v. Gieve*, 9 Abb. N. C. 11; *Leserman v. Bernheimer et al.*, 113 N. Y. 45, 22 St. Rep. 606.

The conclusion, therefore, is reached that the administrator of the estate of Ambrose Arnold must be paid in full out of the money received for the common property, and the remainder of the property in the hands of Lucy's administrators be distributed among his creditors ratably.

In the Matter of the Accounting of GEORGE H. MORGAN *et al.*,
Executors of GEORGE D. MORGAN, Deceased.

(Surrogate's Court, Westchester County, Filed September, 1892.)

EXECUTORS AND ADMINISTRATORS—DEATH OF LEGATEE.

Where a legatee dies before the legacy is payable, and no administrator has been appointed for him, the case is not one within sections

2747 or 2748 of the Code, and the court, on the accounting of the executors of the estate, will direct such legacy to be paid into court, to be delivered ultimately to any one who can establish a legal right to its possession.

Judicial accounting of executors.

Testator gave a legacy to his grandson, George D. M. Fullerton, to be paid when he should become 21 years of age. The executors filed a petition for a settlement of their accounts, but the infant legatee died before service of the citation on him, and no administrator of his estate was appointed. He left as his next of kin his father, who claimed that the legacy should be paid to him.

Eugene Smith, for executors; M. M. Silliman, special guardian.

COFFIN, S.—There seems to be no provision of law precisely covering the facts of this case, but it is provided by section 2729 of the Code that a petition of an executor or administrator may be presented, praying that the creditors and decedent's husband or wife, next of kin, and legatees, "or, if either of those persons has died, his executor or administrator, if any, may be cited to attend the settlement." Hence, had this minor died before filing the petition, it would seem his administrator would have been the only proper party to the proceeding, if he had any. The statute does not authorize the citing of a next of kin of a deceased creditor, husband, wife, legatee or next of kin, and they are, therefore, in no sense proper parties to the proceeding, and payment cannot be decreed to be made to them, simply, but it may decree such payment to the executor or administrator of any of them. Of course the death of the minor does not cause the proceeding to abate, but his administrator, if he had any, might intervene, and be made a party, or he could be brought in and made a party, under the provisions of section 2743. Simply as next of kin, the father cannot, under the authority of section 2731, appear upon the hearing, and make himself a party to the proceeding, because he is not a person

interested in this estate. His interest is in the estate of his deceased son. If, instead of being a minor, the deceased legatee had been of full age, to whom the legacy had been directed to be paid when he reached the age of 40, it is very certain that a vested legacy could be paid only to his executor or administrator, to be administered as a part of his estate. It is not discovered that the fact of his being a minor can make any difference. It does not seem to me that this is a case for a direction in the decree, as contemplated by either sections 2747 or 2748.

The first provides that, where the person entitled to a legacy is unknown, the decree must direct it to be paid into the State treasury. That, it would appear, contemplates a legacy to an individual or a class of persons, as to the child or children of A. B., who are unknown, and cannot be ascertained. Here the legatee is known. The next section, which enacts that the decree must direct the executor to pay to the county treasurer a legacy which is not paid to the person entitled thereto at the expiration of two years from the date of the decree, etc., contemplates a case where the decree directs payment to a legatee who is known, and is alive, and is, as Surrogate Rollins well says in the case of *Koch v. Woehr*, 3 Dem. 282, "of universal application," but that the insertion of such a provision in the decree "is generally of no practical importance, and in most cases may with propriety be omitted." There being found no statute directly applicable to the facts as presented here, resort must be had to subdivision 11 of section 2481 of the Code, in search of a power authorizing a solution of the difficulty. Legislative wisdom has there furnished the way to escape from it. This court is there clothed with power, "with respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of this court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." The Court of Chancery formerly, and

not the Supreme Court, would undoubtedly have power, in a like case, to direct the legacy or fund to be paid into court, to be delivered over ultimately to any one who could establish a legal right to its possession. Therefore the decree herein should contain such a provision. Thus the difficulty supposed to have been encountered in *Matter of Lane*, 20 N. Y. Supp. 78, did not really exist.

In the Matter of the Probate of the Will of JOHN OTIS,
Deceased.

(*Surrogate's Court, Essex County, Filed November, 1892.*)

1. WILL—UNDUE INFLUENCE.

Undue influence, when relied upon to annul a testamentary provision, must be proved; it cannot be presumed. It need not necessarily be proved by direct evidence, but, if not, then such circumstances must be proved from which that conclusion logically and irresistibly follows.

2. SAME—TESTAMENTARY CAPACITY.

Incapacity to make a will cannot be inferred, alone, from advanced years, poor health or a weak mind.

Probate of will.

A. K. Dudley, for proponents; F. A. Smith, for contestants.

McLAUGHLIN, S.—John Otis died on the 10th of March, 1891, having on the 1st of April, the year previous, made and published his last will and testament, which is now offered for probate, and the validity of which is challenged by his son, John W. Otis, upon the ground, mainly, that it was obtained, and the execution thereof procured, by fraud, circumvention and undue influence brought to bear against and upon the testator by Sara D. Bruce, or some other person or persons unknown to the contestant, and also upon the further ground that the testator, at the time of the execution of the will, did not possess sufficient testamentary capacity to make a will. Other formal

objections were made to its probate, but upon the hearing the evidence was directed mainly, if not entirely, to the question of undue influence and want of capacity, and upon the argument the same course was adopted by the learned counsel for the contestant. The will was drawn at the house of the deceased, in Elizabethtown, by Milo C. Perry, an attorney of high standing and character. Mr. Perry was also one of the witnesses to the will. The day previous to its execution the testator sent for Mr. Perry, with whom, as we may infer from the evidence, he was on very friendly terms. Mr. Perry, in answer to the summons, went to the house of the deceased. They were closeted together for some time, no other person being present, and the deceased then gave him "instructions as to how he wanted his will drawn." Mr. Perry, after receiving such instructions, repaired to his office, and prepared a draft of the will, and on the following day returned to the house of the deceased, with whom he was again closeted for some time, during which time the will was read to the deceased by Mr. Perry, and the deceased read it himself. The will was then signed by the deceased, and witnessed by Mr. Perry and one Wilbur H. Brownson. All of the statutory requirements as to the execution and publication of the will were closely followed and carefully observed. Therefore, the questions presented are, whether undue influence was used in procuring the testator to make the will, and also whether the testator had sufficient testamentary capacity to make a will.

The contestant's counsel very ingeniously and strenuously urged the argument that the testator, being aged and infirm, was unfairly, so far as the contestant was concerned, and improperly, influenced in making the will; but the position of the learned counsel in this respect is not at all sustained by the proof. He utterly failed to call the attention of the surrogate to any evidence which would justify such a conclusion. The court of last resort in this State has declared that, to avoid a will on the ground of undue influence, "it must be made to appear that it was obtained by means of influence amounting to moral coercion,

destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse, or too weak to resist." *Brick v. Brick*, 66 N. Y. 144, 149. "It must not be the promptings of affection, the desire of gratifying the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear." *Society v. Loveridge*, 70 N. Y. 387, 394; *Jarm. Wills*, 36, 37; *Gardner v. Gardner*, 34 N. Y. 155. Undue influence, when relied upon to annul a testamentary disposition of property, is in one sense a fraud, and, as such, it must be proved. It cannot be presumed. It need not necessarily be proved by direct evidence, but, if not, then such circumstances, at least, must be proved from which that conclusion logically and irresistibly follows. *Matter of Smith*, 95 N. Y. 516; *Seguine v. Seguine*, 4 Abb. Ct. App. Dec. 191. Applying to this case the rule laid down in the authorities above referred to, there is, as it seems to me, a total failure of proof showing, or tending to show, undue influence upon the testator. The will, then, must be admitted to probate, unless the evidence shows that the testator did not at the time possess sufficient testamentary capacity to make a will. What evidence is there from which the conclusion could be reached that he did not possess that capacity? After the most careful consideration I have failed to discover any.

There is no standard of mental capacity which it is necessary for a person to possess to enable him to make a disposition of his property by will. All that is required is that the testator have sufficient intelligence and mental power to understand what he is doing, and the legal effect of the instrument he is making. If he possess such intelligence, he may bestow his bounty as he likes, even if the disposition he makes of his property may appear, and in fact be, unjust and inequitable. The law gives

to every person in other respects competent to make a will the right to make whatever disposition of his property he chooses, however absurd or unjust. It is true that the testator was at the time seventy-eight years of age, but there is no presumption against his capacity to make a will because at the time it was executed he was advanced in years. Indeed, incapacity to make a will cannot be inferred, alone, from advanced years, poor health or a weak mind. *Horn v. Pullman*, 72 N. Y. 269; *In re Gray's Will*, 5 N. Y. Supp. 464, 24 St. Rep. 345. But, notwithstanding the age of the deceased at the time of the execution of the will, he possessed his usual intelligence and mental powers. The evidence, including the will, shows that he comprehended fully the situation. He sought by his will to provide for the support of his aged wife, giving her for that purpose, if need be, his entire property, in value about \$1,000, and if, after her death, anything was left, it passed to the unmarried daughters. The will does not seem to be unjust, unnatural, or, under the circumstances, even inequitable. Several motions were made by the proponents, at the close of the evidence, to strike out certain testimony, which motions were reserved by consent until the final disposition of the case, but the foregoing views render it unnecessary to pass upon the several motions reserved, for the reason that, admitting all of the testimony offered, I think the will should be admitted to probate, and an order can be entered to that effect.

In the Matter of the Probate of the Will of WILLIAM PORTER,
Deceased.

(*Surrogate's Court, Essex County, Filed November, 1892.*)

WILL—PROBATE.

A will signed by a cross-mark cannot be admitted to probate where only one witness, who did not see the mark made, is produced, the other having died, unless other evidence is produced showing that the deceased actually made the mark.

Probate of will.

The will in question was signed by a cross-mark. Only one attesting witness was produced at the hearing, the other having died.

George W. Watkins, for proponent.

McLAUGHLIN, S.—Following the decision in *Re Reynolds*, 4 Dem. 68, I think probate must be denied. “Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State, competent and able to testify.” Section 2618, Code Civ. Pro. Provisions is made for the proof of a will where one of the witnesses is unable to testify, by reason of death or otherwise, by proving the handwriting of the absent witness and the handwriting of the testator. Section 2620, Code Civ. Pro., provides that, “if a subscribing witness, whose testimony is required, is dead, the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such other circumstances as will be sufficient to prove the will upon the trial of an action.” There is no proof of the handwriting of the deceased. Such proof must be given. It is a positive requirement of the statute where a will is sought to be proved by the testimony of one of the subscribing witnesses. Proof of this character can only be furnished by some person possessing knowledge of the general form and characteristics of the writing of the deceased person which enables the witness to identify it and distinguish it from the signature and writing of another. The only evidence produced is the testimony of one of the subscribing witnesses, and it falls far short of this requirement. Indeed, it is hard to see how any evidence could be furnished which would enable one to distinguish a cross mark from a similar mark made by another person. It is difficult to see how any will, under the provisions of the statute above quoted, could be admitted to probate where the deceased signed by a cross mark, and only one of the subscribing witnesses is produced, and that witness did not see the mark

made. The difficulty would undoubtedly be obviated if other evidence could be produced, showing that the deceased actually made this mark. The provision of the statute, though seemingly working injustice in this case, is a wise one, and must be enforced. Probate refused.

In the Matter of Proving the Last Will of CARL SOHN,
Deceased.

(Surrogate's Court, Herkimer County, Filed January 8, 1891.)

WILL—CONSTRUCTION.

By testator's will he gave his property to his wife "to have full control of all my real and personal estate during her natural life or so long as she may remain my widow, but if she should remarry her control and interest in my property is to cease and shall pass to the heirs hereinafter named," and provided that "in the event of any of the above named heirs previous to the death or remarriage of my wife, their share of my estate shall be inherited by those remaining whose names appear above, and in no event shall my daughter, Mary Sohn, have any portion or share in my personal or real property." *Held*, that testator did not die intestate as to any portion of his property; that the legal effect of the will was to give an estate for life to the widow, liable to be terminated by her marriage, and that upon her death or remarriage the property passes absolutely to the heirs named, subject to the contingency specified in the will.

Probate of will.

Mary Sohn, a daughter of the testator, filed objections to the probate of his will, but upon the hearing withdrew the objections to the probate, but demanded that the will be construed to be an effectual disposition of the real and personal property of the testator only for the life of Caroline Sohn, testator's wife; that only a life estate is created by the will, and that as to the remainder the deceased died intestate.

The will, omitting the formal part, is as follows: "I give, devise and bequeath to my wife, Caroline Sohn, to have full

control of all my real and personal estate during her natural life or so long as she may remain my widow; but if she should remarry, her control and interest in my property is to cease and shall pass to the heirs hereinafter named, viz.: Charles F. Sohn, George W. Sohn, Louisa Pugh, wife of William Pugh, Dora Sohn, Lena Sohn, Leonard Sohn, my grandson, son of Sophia Sohn, deceased, all the above named children and grandchild to share and share alike. In the event of the death of any of the above named heirs previous to the death or remarriage of my wife, Caroline, their share of my estate shall be inherited by those remaining whose names appear above, and in no event shall my daughter, Mary Sohn, have any portion or share in my personal or real property."

William C. Prescott, for proponent; Henry F. & James Coupe, for contestant.

SHELDON, S.—The intention of Carl Sohn that his daughter Mary should not inherit any of his real estate or share in his personal property after his death cannot be doubted, for, not content with leaving her name out of the list of the recipients of his property, he added his emphatic declaration to that effect in the concluding clause of his will. It cannot be supposed, therefore, that he intended to die intestate as to any of his property. All parties agree that the decedent by this will has given his real and personal property to his wife for life, but her life estate is subject to be defeated by her remarriage. The contestant says the only further provision is contained in the literal reading of the words "but if she should remarry her control and interest in my property is to cease and shall pass to the heirs hereinafter named, viz.," that is the life estate of Caroline Sohn should, upon her marriage pass as an estate *per autre vie* to the "heirs hereinafter named," and of course terminate upon her death, thereby making an intestacy as to the remainder; as according to such construction there is only a life estate disposed of by the will.

But such construction leaves meaningless the provision made

for a case where one or more of the remaindermen should die before the termination of the life estate; for I think it must be assumed that the testator by the words "their share of my estate" refers to the share given them by this will, which, upon the construction of the contestant, would be nothing prior to the death or remarriage of Caroline Sohn. I think the various provisions are harmonized and the clear intention of the testator expressed and made effectual by supplying the words "or die" after the word "remarry," and the word "it" after "and" and before "shall pass," so that the clause will read, "but if she should remarry or die her control and interest in my property is to cease and it shall pass to the heirs hereinafter named." The two events, death or remarriage of the widow, are coupled in the will in carving out the first estate; they are coupled also in providing for the event of the death of one or more of the remaindermen previous to the termination of the life estate, and there can be no doubt but that it was by mere inadvertence that the two events were not coupled in the clause which specifies who should receive the property when it should pass from the first taker.

It seems to me a very narrow, technical and unnatural construction to suppose that the testator intended to give to the persons named in the second clause nothing except in the event of the remarriage of his widow, and in that case only the enjoyment of the property divided among six takers for the remainder of her life, leaving intestacy as to the fee.

In the opinion of the court by FINCH, J., in *Phillips et al. v. Davies et al.*, 92 N. Y. 204, is found a statement of the rule of construction which supports the view which I have concluded must be taken of this will. The language of the opinion is as follows: "If such was the real meaning and intention of the testatrix, if an examination of the whole will forces that conviction, if its plain and definite purposes are endangered by inapt or inaccurate modes of expression, and we are sure that we know what the testatrix meant, we have a right, and it is our duty, to subordinate the language to the intention. In such

a case the court may reject words and limitations, supply them or transpose them to get at the correct meaning," citing *Pond v. Bergh*, 10 Paige, 140; *Drake v. Pell*, 3 Edw. 251; *Mason v. Jones*, 2 Barb. 229.

The same rule is stated in *Riker v. Cromwell*, 7 St. Rep. 316; *Roe v. Vingut*, 17 id. 124, 117 N. Y. 204, 27 St. Rep. 238; *Vanderpoel v. Loew*, 7 St. Rep. 304; *Austin v. Oakes*, 15 id. 949; *Holt v. Jex*, 16 id. 270.

An estate may undoubtedly pass by implication. *Jackson v. Schaubert*, 7 Cow. 195; *Willis v. Lucas*, 1 P. Wms. 472.

The law prefers a construction of a will which will prevent a partial intestacy to one which will permit it. *Vernon v. Vernon*, 53 N. Y. 351; *Thomas v. Snyder*, 6 St. Rep. 592.

This rule of construction is especially applicable to a case like the present, where the testator has in his will declared a purpose which a partial intestacy would thwart.

I am therefore of the opinion that the legal effect of the disputed provisions and the true construction is that the will gives the estate for life to the widow, which is liable to be terminated by her marriage, and that upon her death or remarriage the property passes absolutely to Charles F. Sohn, George W. Sohn, Louisa Pugh, wife of William Pugh, Dora Sohn, Lena Sohn, and Leonard Sohn, son of Sophia Sohn, in equal shares, subject, however, to the contingency specified and provided for in the will.

A decree should be prepared in accordance with the foregoing opinion.

In the Matter of the Application of JOSEPHINE B. BURDICK, Administratrix, for disposition of the real property of decedent for the payment of debts.

(Surrogate's Court, Herkimer County, Filed July 23, 1891.)

EXECUTORS AND ADMINISTRATORS—SALE OF REAL ESTATE—LIMITATION.

In 1882 decedent gave a note for \$1,000, payable in one year, and died in 1887. Letters of administration were granted December 19,

1887, and the claim upon the note was presented and allowed, and a payment made thereon on the final accounting in 1890, the personalty being insufficient to pay the debts. In a proceeding for distribution of a surplus arising from a foreclosure sale of the realty, *held*, that the claim was barred by the statute of limitations.

(Church v. Olendorf, 49 Hun, 440, 19 St. Rep. 700, followed.)

On April 1, 1882, Byron L. Huntley made, executed and delivered his note as follows:

“\$1,000.

WEST WINFIELD, April 1, 1882.

“For value received I promise to pay J. Frank Huntley or bearer, one thousand dollars with use one year from date.

“BYRON L. HUNTLEY.”

The note was transferred by Huntley to, and is now the property of Esther A. Bentley. On May 1, 1887, Byron L. Huntley died intestate, leaving a widow and several minor children.

On December 18, 1887, letters of administration were issued to Josephine B. Huntley, the widow of the intestate, and Vose W. Palmer. The administrators advertised for claims against the estate of decedent for six months, commencing November 29, 1888. On the 24th day of June, 1889, Vose W. Palmer, one of the administrators, filed a petition for a final settlement of the accounts of the administrators, and such accounting was thereafter had, the account having been filed, November 6, 1890, and a decree settling the accounts of the administrators was filed and entered in the surrogate's office on that day. By the account and decree made thereon it appears that the administrators received in assets the sum of \$980; that claims of creditors had been presented and allowed, including the claim of Esther A. Bentley, to the amount of \$1,850.09; and that there was \$241.73 in their hands which by said decree was ordered paid to said creditors ratably.

This proceeding for the disposition of the real property of the deceased for the payment of debts was commenced November 10, 1890, by the administrators, by filing a petition in this court, which alleged, among other things, that the deceased was the owner in his lifetime of certain real estate upon which was

a mortgage which, subsequent to his death, was foreclosed; and a surplus arising therefrom amounting to \$1,101.41, paid to the county treasurer of this county; that the debts of decedent amounted to \$1,608.36, exclusive of interest, and that the personal property of decedent was insufficient to pay his debts. That the decedent left a widow, one of the petitioners, and three minor children, his heirs, named Lee Huntley, Adell Huntley and Estella Huntley. Upon the hearing for the proof of claims in this proceeding, Esther A. Bentley appeared, and upon offering proof of her claim the special guardian of the infants, heirs, filed and interposed an answer pleading the statute of limitations, viz.: "That the cause of action and claim now presented as aforesaid arose and accrued more than six years before the commencement of these proceedings." Proof was given of the making and ownership of the note, that it had been presented to the administrators and admitted by them to be a valid claim, and that upon the final accounting they had paid upon the note \$232.29.

Charles D. Thomas for creditor Esther A. Bentley; A. B. Steele, special guardian, for heirs.

SHELDON, S.—The only question in this case is whether the right to the relief sought by the creditor in this proceeding is barred by the statute of limitations.

The statute of limitations affects only the remedy. *Kincaid v. Richardson*, 25 Hun, 237; *Rogers v. Murdock*, 45 id. 30, 9 St. Rep. 660; *Rose v. Henry*, 37 Hun, 397; *Johnson v. A. & S. R. R. Co.*, 54 N. Y. 416.

In the cases of *Kincaid v. Richardson* and *Rose v. Henry* it is held that the statute of limitations only affects the remedy by action, and that execution may issue on a judgment, although an action thereon would be barred by the statute. It is also held in *Rose v. Henry* that statutes of limitation must be strictly construed, and it would seem to be the duty of the court to save the claim from the bar of the statute, unless it appears that the

clear and necessary construction of the various provisions applicable forbids. Section 352 of the Code of Civil Procedure provides that an action upon a contract obligation or liability, or an action to recover upon a liability created by statute, must be brought within six years, and "special proceeding" may be read for action in the same provision. Section 415 of the Code of Civil Procedure provides that "the periods of limitation prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or defendant in the particular action or proceeding."

In this case a right to maintain an action (not a special proceeding) arose April 4, 1883, against the decedent, and had he lived that right of action would have existed six full years and have been as perfect the last day of the six years as the first. Huntley died May 1, 1887, and personal representatives were appointed who took title to his personal property and who were liable to be sued in the place of decedent upon the cause of action against him. The right to that relief was based simply on the fact that Huntley had not performed what he had contracted to do; and the relief to be sought was the judgment of the court that the plaintiff recover the sum which Huntley had contracted to pay. It did not become necessary in this case for the creditor to obtain a judgment against the administrators in order to exhaust the personal property of decedent in payment of his claim, for the claim on presentation was admitted, and the creditor's share of the personal estate afterwards paid to her in due course of administration.

The statute of limitations commenced running against an action on April 4, 1883, because an action might then have been brought.

When did the statute of limitation commence running against this special proceeding? When did the right to relief by this proceeding accrue to the creditor? In considering the question

of when the "right to relief" by this special proceeding accrued the nature of the relief may well be examined.

The relief is equitable in its nature, and very comprehensive.

It comprises the taking and sale under the direction of the court of all the real estate of which the decedent was seized at his death, whether in the hands of his heirs or devisees or their grantees, and the equitable distribution of the money derived from such sale in payment of the claims existing against the decedent at the time of and which survived his death, and among all parties equitably entitled thereto.

The proceeding is against the land. The necessary parties are the creditors, all persons interested in the land, and the personal representatives of the decedent.

The facts which must exist, and be established in order to entitle a party to the relief, are the death, the appointment of personal representatives, the existence of claims against decedent valid at the time of his death to an amount that the personal assets applicable will be insufficient to pay, and "that all the personal property of the decedent, which could have been applied to payment of the decedent's debts and funeral expenses has been so applied, or that the executors or administrators have proceeded with reasonable diligence in converting the personal property into money and applying it to the payment of those debts and funeral expenses, and that it is insufficient for the payment of the same, and that the decedent was the owner at the time of his death of the land sought to be taken. The existence of these facts gives the right to relief. Can the right to relief be said to have accrued until these facts all exist? Did the statute of limitations commence running as against this right of relief until these facts existed?

In *Mead v. Jenkins*, 95 N. Y. 31, the facts were as follows: The claim was due February 11, 1871, and the intestate died March 19, 1871. Letters of administration were granted April 14, 1871. The proceedings in question were commenced February 6, 1880. The administrators accounted on the 17th day of October, 1877. The court, upon these facts, held as follows:

"The proceedings here could not be commenced until after the accounting, and hence the statute did not commence to run until the accounting in 1877. The proceeding was commenced February 3, 1880, about two years after the accounting, and the statute had not then run so as to constitute a bar." The case of *Merritt v. Reid*, 13 W. Dig. 453, was an action on a note for six months, dated August 7, 1872. The action was commenced October 14, 1879. The note was made by a corporation called "Manhattan Sewing Machine Company," and the defendant was a stockholder of that company. By the provisions of the statute a stockholder could not be made liable for a debt of the company unless an action to recover the debt should be brought against the company within a year from the time when the debt became due, and judgment recovered in such action and execution issued upon such judgment returned unsatisfied. Execution was returned unsatisfied October 23, 1873, upon the judgment against the company.

The defense was the six years statute of limitation, and in the trial court it was sustained. The court, on appeal, held that, as the return of execution unsatisfied against the corporation was a prerequisite to an action against a stockholder, the right of action against him did not accrue and the statute did not commence to run until the return of the execution, and that the action was brought in time. It would follow from this case that if the claim was a valid and enforceable one at the time when the new right of relief arose upon it, the new right of relief would not be lost at the expiration of six years from the time when the note was due.

The same doctrine is stated in *Duckworth v. Roach*, 81 N. Y. 50. Upon the foregoing considerations and the authority of *Mead v. Jenkins*, I should be of opinion that the claim of *Esther A. Bentley* is not barred by any statute of limitation, were it not for the case of *Church v. Olendorf*, reported in 19 St. Rep. 700; s. c., 49 Hun, 440, which was decided in this department in 1888. The case of *Mead v. Jenkins*, 95 N. Y. 31, is cited and recognized as authority for the proposition:

"As the law stood prior to September 1, 1880, the respondent could not have commenced such a proceeding as this until after the executor or administrator had rendered his account, and thus such a proceeding was stayed by statutory prohibition until September 1, 1880."

It seems difficult to distinguish as to statutory prohibition between the requirement that an accounting shall be had before this proceeding be commenced, and the requirement as the law stands now that letters of administration shall have been granted and the further requirement that the personal estate shall have been applied to the payment of the claims, or that in effect.

It may be claimed that the case of the issuing of letters as a prerequisite differs from the case of an accounting, because the creditor can himself apply for letters; but so could the creditor as the law stood prior to 1880 apply after eighteen months for an accounting, and in the case of *Mead v. Jenkins* the accounting was more than six years and six months after letters were issued. It seems clear, therefore, that the question of whether or not the running of the statute of limitation is suspended by statutory prohibition is not to be determined by the diligence or laches, or in truth any action of the creditor. Why, then, should the running of the statute in *Olendorf's* case have been suspended until September 1, 1880, and not after that and until letters of administration were issued? Were it not for the decision in the *Olendorf* case it would seem to me more reasonable to say, in view of section 415, that the running of the statute is not suspended, but that the statute as against this relief and remedy does not commence to run until at least after letters are issued. But, controlled as I am by the authority of the *Olendorf* case, I must hold that the claim of *Esther A. Bentley* is barred in this proceeding by the statute of limitations.

In the Matter of the Final Judicial Settlement of the Accounts
of EDWARD T. MULLIGAN, Administrator.

(Surrogate's Court, Herkimer County, Filed March 6, 1893.)

1. EXECUTORS AND ADMINISTRATORS—INVENTORY—PROPERTY SET APART FOR
WIDOW.

The provision of chapter 406, Laws 1889, directing appraisers to set apart additional personal property to the widow in case her interest in the real estate of the decedent in addition to her dower right and personalty to the amount of \$150 is of less value than \$1,000, is not limited to a case where the decedent leaves real estate. A case where the interest of the widow in the real estate of her deceased husband is nothing because of want of value and a case where her interest is nothing for want of real estate are both cases within the meaning of the act.

2. SAME—CONSTITUTIONAL LAW.

Chapter 406, Laws 1889, is not unconstitutional as impairing the obligation of contracts made prior to its passage.

On the 9th day of February, 1890, Thomas Mulligan, a resident of the town of Winfield, in this county, died at said town intestate, leaving a widow, Bridget Mulligan, and three sons, Edward T. Mulligan, James H. Mulligan and William C. Mulligan. At the time of his death the intestate was the owner of and in possession of both real and personal property. On February 24, 1890, Edward T. Mulligan received letters of administration upon the estate of the decedent, and upon the same day, upon the application of the administrator, appraisers were duly appointed to aid the administrator in making an inventory of the personal property of the decedent. On March 8, 1890, the administrator filed his inventory, by which it appeared that the appraisers set apart for the widow of the decedent the articles required to be set apart without appraisal, also furniture to the amount of \$68.53, also other personal property to the amount of \$150.

The appraisers also further returned as follows: "We do inventory and appraise the interest of the widow, Bridget Mul-

ligan, in the real estate of her deceased husband, Thomas Mulligan, in addition to her dower right therein, to be of no value and worthless, and we do, therefore, in compliance and conformity with chapter 406 of the Laws of 1889, inventory and set apart for the use of such widow, Bridget Mulligan, the following described personal property," then follows a list of personal property, the value of which as appraised amounted to \$467.95. The appraisers also returned in the inventory that no other personal property was exhibited to them, and that they believed there was none. Thereafter the administrator filed his account in this court, in which he alleges that he caused an inventory to be made and filed and that the appraisers had set apart to the widow of the deceased all the personal property, and that nothing had come into his hands as administrator. The account also contains a list of the creditors and the amount of their respective claims against the estate which are unpaid. In this list is A. Curtis Day, whose claim appears to be \$2,400.00. Upon the accounting Mr. Day appeared and filed objections to the account, and asked that the administrator be charged with the sum of \$467.95, which the appraisers set apart to the widow. It was proved or conceded on the hearing that on March 1, 1889, Day and wife conveyed to Mulligan, the intestate, a farm of about 108 acres, situated in Herkimer county, which Mulligan owned and occupied at the time of his death, also that Day's claim as creditor was mainly upon a bond given by Mulligan to pay the purchase price of the farm, and was dated March 1, 1889. The inventory made by the administrator, by the aid of the appraisers, was also put in evidence.

Steele & Prescott, for administrator; Root & Jones, for creditor Day.

SHELDON, S.—The administrator claims that the sum of \$467.95, which was set apart to the widow, in addition to the other articles and sums allowed her, was properly set apart to her by virtue of that provision of chapter 406 of Laws of 1889,

which reads as follows: "And in case the interest of a widow in the real estate of a deceased husband, in addition to her dower right and together with said one hundred and fifty dollars, shall be of less value than one thousand dollars, then said appraisers shall set apart for the use of such widow, or for the use of such widow or child and children, in the manner hereinbefore prescribed, personal property which, together with said real estate, shall amount to one thousand dollars in value. Said appraisers are authorized to make an appraisal of the real estate to which the widow may be entitled for the purposes of this section. The provisions of this section shall apply where a man dies intestate, as well as where he leaves a last will and testament." The creditor objecting to the allowance to the widow claims that upon reading the first section of the act in connection with the provisions above quoted, a construction of the act must follow which forbids an allowance of personalty additional to that formerly set apart to the widow except in those cases where the widow has and takes an interest of some value in the real estate of her deceased husband.

In support of this contention the decision of Surrogate Ransom, in Matter of Estate of William Koch, 31 St. Rep. 963, is cited. In that case the learned surrogate held that the additional provision of personal property for the widow could be availed of only in a case where the deceased husband was the owner of real estate at the time of his death.

The opinion of the learned surrogate is entitled to great respect, but I am constrained to think that his view of the statute is a mistaken one. Doubtless a literal reading of the act upholds the position above stated, and upon such a narrow and critical construction it might be urged with nearly as much plausibility that section 30, added by this act to chapter 2 of part 2 of the Revised Statutes fails in its purpose to give the widow an additional portion of the real estate of her deceased husband because it provides that the "widow, in addition to any interest to which she may be entitled under the preceding sections of said chapter two, shall be entitled to the use for life

of an additional portion of the estate," when a reference to the preceding sections of chapter 2 discloses that the widow of an intestate does not become entitled to any interest, whatever, in the real estate of her deceased husband by virtue of those provisions; the provision for dower, which was doubtless intended, being contained in chapter first instead of chapter second. But the statute is plainly an enlargement of the humane provisions of the law in favor of the widow and the orphan, and must be liberally construed to accomplish, if possible, its purpose. *Stewart v. Brown*, 37 N. Y. 350; *Chamberlain v. Darrow*, 46 Hun, 48, 11 St. Rep. 100; *Wilcox v. Hawley*, 31 N. Y. 648.

Another rule of construction is that every provision of the act must, if possible, be given a meaning which permits it to take effect in accomplishing the general purpose instead of a meaning which makes the provision itself void or one which destroys or impairs the general purpose. And the various provisions must be construed, if possible, so that they may become parts of one harmonious whole. Having in view, then, the purpose of the act, it is clear that the provision in section 1, that "such widow, in addition to any interest to which she may be entitled * * * shall be entitled to the use, during her life, of an additional portion of the estate, not exceeding \$1,000 in value," means and should be read, "in addition to her dower right * * * shall be entitled to an additional portion of the estate besides her dower, etc." The words "in addition to" occur twice in section 2 of this act, and once in section 1, and I think must be taken as the equivalent in meaning of *besides* in each instance of its use. It is evident, therefore, that the legislative intent was to make an additional provision for the widow, a provision *besides* the former ones, a provision which should not fail in any case, except for want of property out of which it could be made. It is true that, as to the kind of property from which such provision was to be set apart, real property is preferred, but there is a careful direction given to supply the want of real property to the extent of the deficiency with personal. It might happen that, in a case where a deceased husband de-

vised real estate to his widow, that her interest in the real estate of her deceased husband, over and above her dower, would be of greater value than \$850, and the widow would take no additional personal property by virtue of this act. In another case it might be that the real estate devised to the widow would be of no greater value than her dower right and be in lieu of dower, and then the entire additional provision of \$850 would be set apart from the personal to make up the required \$1,000, and this without regard to whether the dower or devise was of great or little value.

Can it be supposed, then, that in a case where the value of the dower is nominal, or in a case where there is no real estate to which the right of dower might attach, that it was the intention of the act that no additional provision of personal property should be made? A case where the interest of the widow in the real estate of her deceased husband is nothing because of want of value, and a case where the interest therein is nothing for want of real estate, are both, in my opinion, cases within the meaning of this act where such interest, together with said \$150, is of less value than \$1,000, and the appraisers are authorized and required to set apart additional personal property to the amount of \$850, if there is personal property to that amount, and if its value is less, then all the personal should be set apart, as was done in this case.

The further claim is made by the contesting creditor that inasmuch as the contract by virtue of which this claim of indebtedness accrued was made before the passage of the act in question, that the parties intended that this personal property should be available for the satisfaction of the debt and that the legislature cannot pass an act nullifying the intention of the parties manifested in their contracts.

This claim, if anything, is that the act is unconstitutional, because it impairs the obligation of a contract.

The act in question is, in express terms, an amendment of "An act to extend the exemption of household furniture and

working tools from distress for rent and sale under execution as amended." The amendment is in no way different from the original act except that it extends and enlarges the exemption.

The claim that the original act was unconstitutional because it impaired the obligation of contracts made prior to its passage was passed upon in the Court of Appeals in the decision of the case of *Morse v. Goold*, 11 N. Y. 282, where the court held that the act affected the remedy, and not the contract, and was not unconstitutional. This act differs only in the extent of the exemption, and I think the reasons which led to the decision of that case apply with equal force to the case in hand and require a like decision.

The objections to the account of the administrator are not sustained.

In the Matter of the Probate of the Will of OWEN SIMTH,
Deceased.

(*Surrogate's Court, St. Lawrence County, Filed July 20, 1893.*)

1. WILL—KNOWLEDGE OF CONTENTS.

Where the deceased was a man of prudence and care, and all the requirements of the statute as to the execution of wills was complied with, it is not to be presumed that he signed or affixed his mark and made a declaration as to what the instrument was without knowledge of its contents, and the court cannot require, on account of his lack of education, that it must be made to appear that the instrument was read to him.

2. SAME—DELUSIONS.

To constitute a delusion, there must be a belief in the existence as a fact of something which does not exist; and such belief must be without basis for its support, springing up without cause in the imagination of the person entertaining it, and become so firmly implanted in the mind as to withstand such evidence and argument as would convince reasonable persons of its falsity.

3. SAME.

When decedent's son was seven years old, decedent came home intoxicated and told his wife he had been told that said son was not his

child, and repeated the story at different times for thirty years, but only when intoxicated. Some years before his death he told the priest the same thing, and in his will disinherited said son. *Held*, that decedent was not the subject of a delusion which would invalidate the will.

Probate of will.

VANCE, S.—The probate of the instruments offered as the last will and testament, and a codicil thereto, of Owen Smith, deceased, is opposed on two grounds:

First. That said instruments were not the last will and testament of deceased because of want of proof of knowledge of the contents at the time of the execution thereof.

Second. Because of the mental condition of the deceased, it being claimed that he acted under a delusion as to the paternity of his son which rendered him incompetent to make a will affecting the interests of such son.

The evidence clearly shows that Owen Smith could neither read nor write, and it does not distinctly appear that either instrument was read to him.

It clearly appears that the deceased exercised more than ordinary care concerning the safe keeping of his will, that he was a careful, prudent, calculating man in all his business transactions, and that at the time of the execution of each instrument he declared the one to be his last will and testament and the other a codicil thereto.

It is not to be presumed that a man of prudence and care affixed his mark to an instrument and made a declaration as to what that instrument was without knowledge of its contents. If any presumption is to be indulged it is that he knew the contents of the paper. All the requirements of the statute as to the execution of the instruments were fully complied with, and this court cannot add another, that because of his lack of education it must be made to appear that the instrument was read to him.

The chief reliance, however, of the contestant is upon his claim that at the time of the execution of the will and codicil

his father was subject to a delusion as to legitimacy of contestant.

The proof shows that Owen Smith and Louisa, his wife, were married at Canton, N. Y., in 1850. That at the time they were in the employ of Minturn Harrison, in whose employ they remained for about a year after marriage. They then commenced housekeeping upon a lot of fifty acres which he held under contract, the purchase price of which was only partially paid. About eighteen months after marriage there was born to them a son, Henry Smith, the contestant, their only child. The couple continued to reside on the lot before mentioned until July 27, 1892, when Owen died. Their possessions had gradually increased until it had become a farm of 125 acres, under good cultivation and well stocked. In addition to this there was owned at the time of his death four or five hundred dollars in money or note.

He was an industrious, careful, prudent man, his only fault aside from the alleged delusion being the indulgence at times to excess in the use of intoxicants.

At some time, it does not appear clearly when, before fifteen or eighteen years ago, there were stories afloat in the neighborhood concerning the Smith family, the nature of which the evidence does not fully disclose, which had come to the ears of Owen.

When Henry was about 7 or 8 years of age Owen came home from Canton intoxicated, and while in that condition informed his wife that he had been told that Henry was not his child. This was repeated several times each year for almost thirty years, the language used being sometimes a positive assertion that Henry was not his child and that his wife had been untrue to him and had connection with other than himself.

He never did so except when intoxicated, and never in the presence of others. Six or seven years before his death he called upon the priest of his church asking advice as to how he should treat his wife in his will, and stated that Henry was not his son, and he did not intend to leave him any of his property.

It does not appear that he ever mentioned his belief as to the illegitimacy of Henry to any person except his wife and his priest.

By the will the contestant is disinherited, which he insists was the result of an insane delusion on the part of the deceased. In order to determine this question it is necessary to determine exactly what a delusion which incapacitates is. Bouvier defines a delusion as "a diseased state of the mind in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary." Sir John Nichol, in the celebrated case of *Dew v. Clark*, 3 Ad. 79, says: "Whenever a patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and whenever at the same time, having once so conceived, he is incapable of being, or at least being permanently reasoned out of that conception, such a patient is said to be under a delusion." Judge REDFIELD, in his treatise on wills, says: "A belief based upon evidence, however slight, is not delusion, which rests on no evidence, but upon mere surmise."

All the authorities to which I have had access agree that to constitute a delusion there must be a belief in the existence as a fact of something which does not exist; that such belief must be without basis for its support, springing up without cause in the imagination of the person entertaining it, and become so firmly implanted in the mind as to withstand such evidence and argument as would convince reasonable persons of its falsity.

Was Owen Smith the subject of such a delusion? It is beyond question that he believed that the contestant was not his child, and that such belief was without foundation in fact. But was this belief the creature of his imagination? I cannot but believe from the evidence that "the stories" which were in circulation had much to do with this belief. The gossip of the neighborhood had lodged in his mind a poison, the venom of which, in his sober hours, he was able to restrain, but which,

when reason was driven out by rum, exhibited itself in the charge of unchastity of his wife. It must be remembered that on the first occasion in which she says he mentioned the matter to her he said he had heard that Henry was not his child. The continued repetition of this charge for years in drunkenness produced such an effect upon his mind that he came at last to believe it, and at length he reveals his convictions to his priest.

Thus the element of a delusion, a belief existing without cause, other than the imagination of the deluded, is wanting.

The other element of a delusion, that it must be belief maintained in opposition to evidence and argument that would convince the ordinary mind of its falsity, is also wanting. So far as the evidence in this case goes, it does not appear that the wife whose chastity was impugned, nor the good priest to whom he went for advice, made any attempt by argument or evidence to convince him of his error.

It must be apparent that if Owen Smith heard the report that contestant was not his child and that report was true, he labored under no delusion in regard to the matter; if the report was not true, it was still evidence upon which he could act, however unjust and mistaken his action might be, without rendering what he did the result of insanity. If no such report was heard by him and he never believed his wife to have been untrue to him, then he can be accused of depravity, not of insanity.

Upon all the evidence, I cannot escape the conclusion that at the time of the execution of the instruments offered for probate Owen Smith was not the subject of a delusion in regard to the paternity of the contestant, and the instruments must, therefore, be admitted to probate.

In the Matter of the Estate of SIDNEY SMITH, Deceased

(Surrogate's Court, Madison County, Filed March, 1893.)

COLLATERAL INHERITANCE TAX—APPRAISAL OF PROPERTY OMITTED.

While the decree of the surrogate in a proceeding under section 13 of the act is conclusive upon the State and the property affected

thereby cannot be reappraised; yet where property was withheld from the appraiser, whether intentionally or otherwise, and therefore was not appraised, such omitted property may be assessed in proceedings under sections 16 and 17.

Motion to dismiss collateral inheritance tax proceeding.

H. M. Aylesworth, district attorney (H. B. Coman and S. D. White, of counsel), for petitioner; William Man (S. M. Lindsley, of counsel), for respondents.

KENNEDY, S.—Sidney Smith, a resident of Madison County, died on the 29th day of October, 1886, leaving a large amount of personal and real estate in possession of his committee. On the 28th day of December, 1886, the surrogate of this county appointed Adon Smith administrator of his estate, and he thereupon duly qualified and entered upon the discharge of his duties. On the 3rd day of March, 1887, said administrator filed in the office of the surrogate an inventory of the personal estate of said decedent, which amounted to the sum of \$390,872.83. On the 26th day of February, 1887, the surrogate appointed William M. Henderson appraiser for the purpose of ascertaining the amount of the inheritance tax to which the State was entitled. On the 26th day of March, 1887, said appraiser filed his report, whereby he appraised the property of said decedent liable to said tax at the sum of \$484,000. The surrogate, after making certain deductions from the reported amount of the estate, adjudged the value of the property liable to taxation at the sum of \$270,000, and assessed a tax of \$13,500 thereon, which was duly paid by said administrator. On the 23rd day of October, 1888, a judicial settlement of said estate was had before the surrogate, and distribution was ordered according to law.

On the 3rd day of July, 1890, H. M. Aylesworth, then district attorney of this county, upon due notice from the county treasurer, presented to the surrogate a petition, wherein it was alleged, upon information and belief, that the personal estate of said Smith, instead of being \$390,000, was in fact more

than \$700,000, and that said appraisal was procured by said Adon Smith and others by false and fraudulent representations as to the amount and value of said estate, and by fraudulent concealment from the appraiser as to the true condition thereof. Upon these facts, said Aylesworth asked, among other things, that a citation be issued requiring all persons interested in the property liable to the inheritance tax to appear in Surrogate's Court and show cause why said tax should not be paid, and for such other order, decree and relief as might be just and proper; whereupon a citation was issued in accordance with the prayer of the petition. Upon the return of the citation, the administrator and some others of the interested parties appeared specially and filed answers alleging, among other matters of defense, a lack of jurisdiction in the surrogate to entertain the proceedings, because of the fact that there had been an appraisal of the estate, and the surrogate had already assessed the tax due thereon, and the same had been paid. The surrogate overruled the objections of the respondents, whereupon they appealed to the General Term of the Supreme Court. After argument upon the issue raised by the petition and answers, the court affirmed the ruling of the surrogate. From this decision the respondents did not appeal. Subsequently, they appeared in Surrogate's Court and filed their answers in this proceeding. At the close of the evidence on the part of the petitioner the respondents again moved to dismiss the proceeding upon the ground of lack of jurisdiction by the surrogate to entertain the same.

The respondents rely upon the opinion in the Matter of the Estate of Wolfe, 137 N. Y. 205, 50 St. Rep. 406, as authority for the position assumed by them, to wit, that after one appraisal has been had, the surrogate cannot require another appraisal to be made, while the counsel for the petitioner claim that it has no application to this case and rely upon other reasons and decisions in support of their theory of the law.

We shall hold, however, that the Wolfe case amply justifies the practice adopted in this proceeding, plainly suggests the

ground upon which it may be maintained, clearly and concisely points out the procedure by which the inheritance tax may be collected, and the principles which underlie the system of taxation in this State introduced by chapter 483 of the Laws of 1885, known as the collateral inheritance tax act.

As a basis for our conclusions of law, we quote from Judge GRAY's opinion, as follows:

"When we read all the provisions of this act, it is perfectly apparent that an especial system of taxation was created for the benefit of the State, with all the necessary machinery for its working; the control of which was vested in the Surrogate's Court, with a jurisdiction exclusive in its nature. In the assessment of a tax upon property passing by will or by the intestate laws, the responsibility is imposed by law upon the surrogate. He acts for the State, and he is commanded to assess and fix the tax to which the property is liable. * * * When the machinery of this system of taxation is set in motion under section 13 of the act, whether upon the application of interested parties, or upon his own motion, the surrogate, by force of its provisions, is at once vested with the office and the functions of an assessor for the State, whose duty it is to assess for its use a tax; and in whom, not only by virtue of the office, but by the further provisions of section 15, inheres the authority, and upon whom rests the obligation to determine the question of whether the property of the decedent, which passes to others, is subject or liable to taxation by the State. * * * I can see no difference between the principle upon which the surrogate acts in proceeding to assess property for taxation under the act and that upon which, in the general system of taxation in the State tax assessors act in the assessment of persons or property for taxation."

Parallel illustrations will show that Judge GRAY is correct when he says that there is no difference in the principle upon which a surrogate and town assessors act in the assessment of persons and property, and we now point out their similarity as follows:

The town assessors are required to ascertain by diligent inquiry all the taxable property, real and personal, within their town, and to assess the value thereof.

It is the duty of the surrogate to appraise the property of a decedent at what was the fair and clear market value thereof at the time of the death of the decedent; and, in order to fix the value of the property of persons whose estates shall be subject to the payment of said tax, the surrogate is authorized to appoint some competent person as appraiser, as often as and whenever occasion may require the appraisal of the decedent's property.

Chapter 453 of the Laws of 1865, in relation to property liable to, but omitted from, assessment by the assessors, authorizes the assessors to enter the omitted property on the assessment roll at the valuation of the preceding year, and the board of supervisors are required to lay a tax thereon at the rate per cent. of tax imposed upon land or property in said town the preceding year.

Chapter 483 of the Laws of 1885, the inheritance tax act, sections 16 and 17, points out the procedure to be followed in case a tax has been assessed but not collected, or in case it is due, but has been omitted from assessment by the surrogate. Judge GRAY says the tax may be due because the surrogate so determined under section 13, or where no proceedings have been had for its appraisal.

Having shown that the principles upon which the surrogate and town assessors act are similar, we state the result of this application in this case.

The surrogate appointed an appraiser for this estate. The appraiser examined and appraised all the property which the administrator presented to him for appraisal, and made and filed his report. He had no authority then, as he now has, to subpoena witnesses and interrogate them under oath as to the true condition of the estate. He had no personal knowledge of it, and all that he could do was to accept the voluntary statement of the administrator or others as to its character and of what

it consisted. There is no dispute but that the report of the appraiser, upon which the surrogate acted, appraised all the property presented to him by the administrator for his consideration or valuation, and all the property mentioned in the inventory filed by the administrator. As to this property, thus appraised, upon which the surrogate has assessed the tax, we hold that the decree of the surrogate is conclusive upon the State, and that such appraisal, assessment and decree cannot be attacked in this proceeding.

If it be true that a large amount of property was withheld from the consideration of the appraiser, whether intentionally or otherwise, and as to which the appraiser had no knowledge, and the same was, for this reason, not appraised, we shall hold, as to such omitted property, that the state has the legal right to institute such proceedings for the recovery of such tax as may be due thereon. This omitted property has never had its day in court. It has never been submitted to the jurisdiction of the appraiser or surrogate, and therefore has never been put in jeopardy. It has, intentionally or otherwise, eluded the tax due the State. All that the Wolfe case decides is, that where property has once been submitted to the surrogate for taxation, his decree, if wrong, can only be reviewed upon appeal, and cannot be attacked in another proceeding. It does not hold that other property, upon which a tax is due, cannot be assessed under sections 16 and 17, in another proceeding for that purpose. The statute says that the surrogate shall appoint a competent person appraiser, as often as and whenever occasion requires; and the reason given by the courts for this provision of the law is, that property may be fraudulently concealed, accidentally overlooked, or it may not be known to the representative of the decedent at the time of the appraisement.

We do not understand by this that property which has once had its day in court, for the purpose of taxation, can be reappraised, unless, for some cause, such appraisal has been, on appeal, or otherwise, re-opened or set aside by the court. Only such property as has been omitted from appraisal is to be taken into consideration.

We, therefore, hold that if the allegations of the petitioner in this proceeding are true, the State has the legal right to an appraisal of the property of Sidney Smith, deceased, which has not been appraised, and upon which the tax has not been assessed by the surrogate in the former proceeding for that purpose.

The motion of the respondents for the dismissal of this proceeding is, therefore, denied.

In the Matter of the Estate of DANFORTH DAGGETT, Deceased.

(Surrogate's Court, Cattaraugus County, Filed November 21, 1892.)

LIMITATION—WAIVER OF BY INCLUDING CLAIM IN INVENTORY.

Including in the inventory a note or claim against the executor, without other comment or memoranda, is such an acknowledgment as to take it out of the statute of limitations.

Judicial settlement of accounts.

E. A. Scott, for the widow; W. R. Pindar, for administrator.

DAVIE, S.—This is a proceeding for the judicial settlement of the accounts of Nelson Daggett, as administrator of the estate of said deceased.

Danforth Daggett died intestate, at the town of Yorkshire, in the month of August, 1889, leaving a widow and descendants, and owning real estate of the value of \$1,150.00, and personal property to the amount of about \$500.00, and letters were granted upon his estate September 2, 1889.

The administrator, with the aid of appraisers, duly appointed for that purpose, prepared an inventory of the estate, which was filed November 7, 1889.

In making such inventory, the appraisers sought to set off to the widow, in addition to the articles exempted to her by the

Revised Statutes, and the \$150 provided for by chapter 157 of the Laws of 1842, an interest in the real estate of the deceased in the following terms: "Under chapter 406, Laws 1889, we set off in conformity to said law one house and lot in the village of Yorkshire Center, N. Y., and being the same house in which the said Danforth Daggett resided before his demise, described, etc., * * * and appraised at \$1,000."

A proceeding was thereupon commenced in Surrogate Court, upon the petition of the widow, to procure an order directing the administrator and appraisers to correct said inventory by setting off to the widow the entire amount of personal property to which she was entitled under the provisions of chapter 406, Laws 1889, which proceeding resulted in decree directing said appraisers to set off to the widow, in addition to what they had already allowed her, other personal property to the amount of \$369.31, and the administrator appealed from the order entered therein to the General Term, where said order was affirmed, Matter of Daggett, General Term, April 16, 1891, 37 St. Rep. 810, and the widow thereupon became entitled to the entire personal estate.

Among the items of personal property included in the inventory was a promissory note, made by the administrator to the deceased, dated September 23, 1879, for the sum of \$150.18, and which, with the accrued interest, was appraised at \$251.18. In the account filed the administrator credits himself with the amount of said note, so appraised, alleging that the same is not a valid claim, being barred by the statute of limitations.

Objections are filed on behalf of the widow to various items of said account, none of which are now insisted upon aside from the claim that the administrator should be charged with the amount of said note.

It is provided by statute that the naming of any person executor in a will shall not operate as a discharge or bequest of any just claim, which the testator had against such executor, but that such claim shall be included among the credits and effects of deceased in the inventory and such executor shall be liable for

the same as for so much money in his hands at the time such debt or demand becomes due. 2 Rev. St. 84, sec. 13. And although insolvent at the time of his appointment he is bound to account for a debt so due from him and should be charged therewith on the settlement of his accounts as for so much money in his hands. *Baucus v. Stover*, 89 N. Y. 1.

The principle enunciated by the statute and applied by the authority above cited is recognized as equally applicable to administrators, inasmuch as the necessity for such a rule, viz., to obviate all difficulty, doubt, embarrassment and the incongruity of requiring a personal representative to proceed against himself for the collection of a debt, is equally great in both cases.

So, the inquiry in this case is, was this note a valid claim against Nelson Daggett at the time of his appointment, or has it become so by any act of his since his appointment? If it is, then he must account for it, as for so much money in his hands.

The note, upon its face, is barred by the statute, but it is claimed that the running of the statute was suspended by an indorsement thereon of \$1.50, under date of May 18, 1885.

The indorsement is in the following form: "May 18, 1885, received on the within note, one dollar and fifty cents," but it does not appear that such indorsement was made with the knowledge or consent of the maker of the note, or that he, in fact, made any payment whatever thereon. Several witnesses are called who were well acquainted with the handwriting of both the intestate and the administrator, and who testify, with a considerable degree of certainty, that such indorsements are not in the handwriting of either. They further state that the note was exhibited to them at the time of making the appraisal and that the indorsement then had the appearance of having been very recently made, that the ink presented a bright, metallic lustre peculiar to writing recently done.

The indications are that such indorsement was made by some one interested in keeping the note from becoming barred, and acting under the supposition that the mere crediting of a small amount thereon would accomplish that result, and there is noth-

ing in the fact that the note bears such indorsement that justifies the conclusion that the note is not barred by the statute.

It is urged on the part of the widow that, assuming such note to have been barred at the time of taking the inventory, the act of the administrator in including it among the other assets of the estate was a sufficient written acknowledgment to remove the bar.

In the original inventory filed, this note was described as follows: "One note by Nelson Daggett, dated Sept. 23rd, 1879, present amount \$251.18." No other comment or memorandum, with reference to this demand, appears in the inventory, although one other claim set forth therein is characterized as "doubtful," and another as "outlawed." The inventory is verified by the administrator in the following form:

STATE OF NEW YORK, }
Cattaraugus County, } ss.:

I, Nelson Daggett, do swear that I am administrator of the estate of Danforth Daggett, the above named deceased;

That the following inventory is in all respects just and true; that it contains a true statement of all the personal property of the said deceased which has come to my knowledge, and particularly of money, bank bills and other circulating medium belonging to the said deceased, and of all just claims of the said deceased against me, according to the best of my knowledge (and also of the real estate of deceased, as required by chapter 406, Laws of 1889).

"NELSON DAGGETT.

Sworn to before me, this 7th }
day of November, 1889. }

C. S. PERSONS, Justice of the Peace.

While an acknowledgment or promise in writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the statute, Code Civ. Pro. sec. 395, yet it has been distinctly held that including such claim in the inventory was a sufficient acknowledgment. *Ross v. Ross*, 6 Hun, 80;

Morrow v. Morrow, 12 id. 386; Clark, Adm'r, v. Van Amburgh, 14 id. 557; Bryar v. Wilcocks, 3 Cow. 159; Stuart v. Foster, 18 Abb. Pr. 305.

The evidence discloses that, at some time during the progress of the appraisal, the administrator objected to this note being inventoried, but that is of little consequence in view of the fact that it was included among the assets and verified by the administrator as a just claim of the deceased against him. If the administrator had persisted in his refusal to include this note among the assets, or had refused to verify the inventory containing it, then, of course, no liability could be predicated upon the fact that the appraisers had enumerated it in the schedule of assets; or even if characterized in the inventory in the same manner as another claim therein set forth, "outlawed," there might be some opportunity of escaping, in this case, an application of the authorities above cited; but the declaration of the administrator under oath regarding the claim in controversy does not seem to leave much opportunity for speculation.

It must be held in this case that the administrator should be charged with the amount of the note, and a decree will be entered accordingly.

In the Matter of the Estate of WILLIAM F. WHEELER, Dec'd.

(Surrogate's Court, Cattaraugus County, Filed December 22, 1892.)

1. COLLATERAL INHERITANCE TAX—PARENTAL RELATION.

One who has been brought up by testator from childhood and treated as one of the family, although not adopted by him, is one to whom he stood in the relation of a parent within the meaning of the statute.

2. SAME—REAL ESTATE—EQUITABLE CONVERSION.

While real estate which descends or is devised directly to wife or children is not taxable, yet if the decedent makes such a testamentary disposition of his real estate as to convert it into personalty, the shares of the legatees under such a will are liable.

3. SAME—POSTPONEMENT OF ASSESSMENT.

A larger part of testator's real estate was partnership property, and the actual value of his interest depended largely on the manner in which it was controlled. The will directed the executors to continue in the partnership until it might be disposed of to the best advantage. *Held*, a proper case for postponement of the assessment and collection of the tax until the parties entitled came into actual possession.

Collateral inheritance tax proceedings.

William E. Wheeler, for executors; H. O. Wait, county treasurer, in person.

DAVIE, S.—William F. Wheeler died at the town of Portville, Cattaraugus County, on the 6th day of June, 1892, leaving a will, which was admitted to probate by the Surrogate's Court of said county on the 21st day of June, 1892, and on the same day letters were issued thereon to William E. and Nelson P. Wheeler, sons of deceased, the executors named in said will.

Shortly thereafter an appraiser was appointed, upon the application of the executors, to determine the value of the estate of decedent subject to taxation pursuant to the provisions of the "Act in relation to taxable transfers of property." Chapter 399, Laws 1892. Such assessment was made, and report thereof duly filed, and this controversy arises upon the proceedings to determine the amount of tax to which said estate is liable, as required by section 13 of said act.

By the terms of the will and codicils thereto, the testator devised to his wife the use, during her life, of certain real estate designated in the will as the "homestead," and also bequeathed to her certain articles of personal property and the sum of \$20,000 absolutely, one-half thereof to be paid upon the probate of the will, and the balance in one year from the death of the testator. To each of his two daughters the testator bequeathed the sum of \$5,000 in addition to certain specific articles; to his son Nelson he devised an undivided one-half of the testator's interest in certain lands in the County of Venango, Pennsyl-

vania; and to each of his sons the sum of \$5,000. By the terms of his original will, testator bequeathed the sum of \$2,400 to one Emma Godfrey, but by a codicil to said will this bequest was revoked, and in place thereof Miss Godfrey was given an annuity of \$300 during her life.

The original will further provided: "I appoint Nelson P. Wheeler and Wm. E. Wheeler (my sons) for the executors of my will, and also appoint them my trustees, to whom I give and bequeath to each the sum of four thousand dollars, in addition to the aforesaid bequests to them. All the rest and residue of my estate, both real and personal, whatsoever and wheresoever situated in any of the United States, I give, devise and bequeath to my sons, Nelson P. Wheeler and Wm. E. Wheeler, or their survivors, and the heirs, executors and administrators of such survivor, in trust, first, to pay and expend all such sums as may be necessary for the support and education of my minor children, in order that they may be supported and educated in a manner suitable to their state in life, until said children may arrive at their majority. Second, I direct my said executors and trustees to divide the remainder of my estate among my children, Nelson P., Wm. E., M. Augusta and Lilla, and my said wife, Morilla, each an equal share, which I direct my executors, heretofore named, to make as soon after the said children, or the survivor of them, shall arrive at majority, and my estate, last aforesaid, disposed of to the best advantage according to the nature thereof, and when it shall be in the minds of my executors not necessary to continue longer any of my said estate in partnership with that of other persons now holding in partnership with me."

Then followed in the will an express direction to the executors to continue said estate in partnership with that of said other persons until the same might be fully disposed of to the best interest of said estate, and full power and authority was therein given to the executors to sell and convey said real estate.

The original will bears date the 21st day of March, 1866. By a codicil thereto, under date of November 20, 1882, the

testator further provided that "the gift and bequest of the sum of four thousand dollars to each of my sons, William E. Wheeler and Nelson P. Wheeler, in my said former will, is hereby ratified, but it is to be expressly understood that the said bequests are made to them severally as compensation for their services as executors and trustees under my last will and testament, and are to be paid to them severally only in the event they serve in that capacity, and I do further will and ordain, that for their services as such executors and trustees they be severally paid in addition to said bequest each at the rate of one thousand dollars for each year of such service, and further, that the foregoing compensatory provisions in their behalf shall be in full satisfaction to them respectively for all such services."

The first question which arises is upon the claim of the legatee, Miss Godfrey, to exemption from taxation under the provisions of said act.

She is of the age of fifty-six years, and no relation to the testator; the present cash value of her annuity, ascertained and computed in the manner directed by section 11 of said act, is the sum of \$2,759.06, and, if liable to taxation at all, is at the rate of five per cent.

This legatee had never been adopted by the testator in conformity with the laws of this State, but the reason urged for such exemption is that she is "a person to whom the deceased, for not less than ten years prior to his death, stood in the mutually acknowledged relation of a parent." Section 2 of said act.

The evidence shows that this legatee was left motherless and homeless at the age of six years; that she was thereupon taken into the family of the testator, and continuously resided there up to the time of his death; she was educated by the testator and always supported and maintained by him; she had no income or property of her own, and no communication whatever with any of her own relatives, except to occasionally visit a brother residing near by; she always enjoyed the same family privileges and social advantages as did the daughters of the

testator; was always received in company in the community where testator lived as a member of his family; testator from time to time made gifts to his children, always giving an equal amount to this legatee; shortly before his death all of testator's children visited him, and he presented to each the sum of \$1,000, giving to Miss Godfrey the same amount; he procured a policy of insurance upon his life for the sum of \$3,000, in which his two daughters and Miss Godfrey were named as beneficiaries to an equal amount. The life estate to the wife of the property designated in the will as the "homestead," is followed by this injunction: "I do hereby direct and ordain that it be and remain also a home for our said daughter Lilla, and our friend, Emma Godfrey, respectively, as long as they, or either of them, may need or desire to make that their home."

Notwithstanding all these facts, it is contended that, inasmuch as there was no legal adoption of this legatee by the testator, and as he designates her in his will by the term of "friend" and not that of "daughter," she is not entitled to the exemption. These suggestions impress me as having but little force; the statute under which this tax is sought to be enforced is, to some extent, penal in its nature, and should receive a liberal construction in favor of those sought to be brought within its operation. The fact that testator did not speak of this legatee as a daughter is of little importance in view of all the facts disclosed by the evidence, showing conclusively that, for a long period of years, testator treated her, in every particular, the same as he did his own daughters, always actuated by the same solicitude for her comfort and welfare as for theirs. The reciprocal relations existing between testator and his own children were no better defined than those between him and this legatee; there was an utter dependence upon the one side, and all the evidences of paternal protection upon the other; she always received from the testator the support and maintenance expected from a parent, and extended to him the obedience, deference and respect due from a child. In my judgment it would be difficult to conceive of a case more clearly within the spirit and

intent of the exempting portion of the statute, and it must be held that the bequest to Miss Godfrey is not subject to taxation under said act. *Matter of Spencer*, 21 St. Rep. 145; *Matter of Butler*, 58 Hun, 400, 34 St. Rep. 189.

The report of the appraiser shows the value of the personal estate of decedent to be the sum of \$146,921.80. From this should be deducted a specific legacy to the Presbyterian church society, of the town of Portville, of \$3,000, the value of the annuity of Miss Godfrey, \$2,757.90, and debts of the testator to the amount of \$6,000, leaving a balance of \$135,163.90, subject to taxation at the rate of one per cent., making a total tax of \$1,351.63, to be paid by the said legatees in proportion to the amount of their specific shares and legacies, and no reason is urged, and, in fact, none seems to exist, why said tax should not be immediately payable.

But a more perplexing question is raised in relation to the liability of the real estate to taxation. Under the provisions of the statute, chapter 399, Laws 1892, the real estate, if devised directly to the sons and daughters, would not be liable to taxation, but it is urged that, by the terms of the will, there is an equitable conversion of the real estate so that the legatees take no interest in the real estate itself, but in the proceeds derived from the sale thereof.

While it is undoubtedly true that a will must at least be of such a character as to leave no doubt of the testator's intent to have his real estate converted into personalty in order to sustain the theory of equitable conversion, *Hobson v. Hale*, 95 N. Y. 588, it would seem that the provisions of this will would admit of no other construction. It not only clothes the executors with certain powers regarding the control and management of the estate, but specifically gives them the power to contract for the sale of the same and execute deeds of conveyance thereof, directs the payment of an annuity to Miss Godfrey during her life, provides for the support and education of his minor children, and directs an equal division of the residuum after payment of the specific legacies among his wife and four children.

This undoubtedly constitutes a conversion of the real estate. *Hatch v. Bassett*, 52 N. Y. 359; *Power v. Cassidy*, 79 id. 602; *Dodge v. Pond*, 23 id. 69.

While real estate which descends or is devised as such directly to the wife or children is not taxable, it is evident that if decedent makes such a testamentary disposition of his real estate as to convert it into personalty, the shares of the legatees under such a will are liable.

All taxes imposed by the act referred to are due and payable at the time of the transfer, provided, however, "that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event, by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the person or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof." Section 3, chapter 399, Laws 1892.

It appears in this case that the real estate of which testator died seized was very largely, if not entirely, partnership property, used and occupied by him in connection with other persons in the prosecution of the lumbering and tannery business, and that the actual value of such real estate or testator's interest therein, is dependent largely upon the manner in which the same is controlled; this seemed to have been the consideration which prompted the testator to clothe his executors with discretionary power regarding the manner and time of disposing of the same, and it is by no means practicable to ascertain the value of such interest at the present, but would seem to be a very proper case for postponing the assessment and collection of the tax to which the same might be subject until the parties entitled thereto come into actual possession or enjoyment thereof.

A decree will be entered accordingly.

In the Matter of the Probate of the Will of JARVIS KNAPP,
Deceased.

(Surrogate's Court, Orange County, Filed January 12, 1893.)

WILL—REVIVAL OF REVOKED.

A will which has been formally revoked, but not destroyed, can be revived by the execution of a codicil to it without a re-execution of the will. The intermediate will is thereby revoked.

Probate of will.

Esmond & Ward, for petitioner.

COLEMAN, S.—Jarvis Knapp, on the 11th day of April, 1885, duly executed a last will and testament, and on the 22nd day of June, 1889, he in like manner executed another will, in which he revoked all former wills by him made. On the 29th day of September, 1890, he executed a codicil, in which it is stated:

“Whereas I, Jarvis Knapp * * * * did on April 11, 1885, make my last will and testament, being the foregoing will, etc.,” and further on “I ratify and confirm my said last will so far as it does not conflict with this codicil thereto.”

On the 29th of September, 1890, he executed another codicil in which he again referred to the will of April 11, 1885. The will of 1885 and both codicils are all written upon the same sheet of paper and were all executed with proper legal formalities. This will and codicils are now offered for probate.

The question presented for my consideration is whether a will which has been formally revoked, but not destroyed, can be revived, by the execution of a codicil to it, without a re-execution of the will in the manner prescribed by statute.

At first thought it would appear that a valid codicil could not be made to an invalidated will; but the law seems to be that a will and codicil, under these circumstances, together constitute a valid testamentary instrument.

In 1 Jar. on Wills, 188, the author states the law in England to be that "if a testator makes a will in 1830, and at a subsequent period, say 1840, makes another will inconsistent with the former, but without destroying such former will, and afterwards makes a codicil which he declares to be a codicil to his will of 1830, this would set up the will so referred to in opposition to the posterior will."

And that view of the law is sustained by the courts of this State in the cases of Storms will, 3 Redf. 327, and Brown v. Clark, 77 N. Y. 369. In the first of these cases the surrogate admitted the will on insufficient proof as to its execution, the execution of the codicil being completely proved. In Brown v. Clark, *supra*, which was a case where a woman, being unmarried, executed a will and subsequently married, and after marriage duly executed a codicil to such will, it was held that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into the will. And the will and codicil were sustained, although the will by law had been revoked by the marriage.

The effect of sustaining the will and codicil is to revoke the intermediate will, 1 Jar. on Wills, 188, even though not revoked in terms by the codicil, as being inconsistent. But in this case this is not material, as the provisions of the first will and codicils are practically the same as those of the other will.

An order may be made admitting the will and codicils to probate.

**In the Matter of the Judicial Settlement of the Trustees Under
the will of HENRY BULL, Deceased.**

(Surrogate's Court, Orange County, Filed January 20, 1893.)

1. EXECUTORS AND ADMINISTRATORS—ASSESSMENT ON BANK STOCK.

By the will of testator the executors were directed to hold certain bank stock owned by him. Upon the settlement of the estate the

executors were directed to retain the stock in two banks, as trustees, and pay the income to testator's daughter for life and the stock on her death to her issue; if none, to certain of testator's children. One of the banks failed, and an assessment was made on the stockholders for the amount of the stock. *Held*, that the legatees interested under the will took their interest subject to all the necessary incidents, including the possibility of such assessment, and that the trustees should sell the other bank stock to pay said assessment and distribute the balance among those entitled under the will.

2. SAME.

The daughter died without issue, and, in the meantime, certain of testator's children had also died. *Held*, that the interest of such as died lapsed with their death, and the fund should be distributed among the survivors.

Henry Bull died in 1863, and in 1866 his executors had a formal settlement of their accounts before the surrogate of Orange County. By the decree made on the settlement, the executors were directed to retain forty shares of Quassaic Bank stock and five shares of Middletown Bank stock, and pay over the income thereof to the testator's daughter, Catherine Ann Bull, during her natural life, and at her death to pay over said bank stock to her issue, if any there be; if none, then to certain of the testator's children.

Catherine died in June, 1892, and several of the testator's children named had died in the meantime.

At the time of this settlement the Middletown Bank stock still stood in the books of the bank in the name of the testator. Several years ago the bank failed, and an assessment was made upon the stockholders for the amount of their stock. In the meantime the executors had received the dividends on the stock and paid them over to the daughter, Catherine. The receiver of the bank is a party to this proceeding, and asks that the trustees be directed to pay the amount of the assessment. On behalf of the trustees it is urged that the claim is against the estate of the deceased, and that the receiver should look to the residuary legatee.

M. N. Kane, for trustees; W. Vanamee, for receiver.

COLEMAN, S.—At the time of the judicial settlement of the accounts of the executors, in 1866, their duties as such executors with reference to the property then accounted for ceased, excepting only the duty imposed upon them by the decree to apply the balance of the estate remaining in their hands in the manner therein directed, and when that was done they had no further connection with such property as executors. They had previously advertised for creditors, and any creditor presenting a claim thereafter could recover nothing from them unless subsequently *other* property should come into their hands belonging to the estate. By the decree the executors were directed to retain certain bank stock upon a trust created by the will. Now the fact that the trustees and the executors are the same persons does not place such a creditor of the estate in any better condition with reference to the trust fund than would have been the case if the executors had transferred the trust property over to other persons as trustees. Nor has such creditor any greater rights in this trust property because it remains in character the same as when held by the executors, than he would have had had such property been converted into money, and the money paid to the trustee.

Some doubt may arise as to the correctness of the latter statement because of the liability of the testator's estate growing out of the fact that the stock still remains upon the books of the bank in the name of the testator. It must nevertheless be true, because no claim, by reason of this liability was made by any one upon the executors before the title to the property had passed by the decree from them as executors. A creditor may pursue property for the payment of his debt after it has passed from the executor, but that is not done by means of proceedings against executors. If the receiver can compel the payment of his claim in these proceedings it must grow out of some other reason than that he is a general creditor of the testator.

These accounting trustees received the capital stock of these two banks as so much property already invested to be held upon the trust set forth in the will. If instead of receiving bank

stock they had received cash and had invested it in these bank stocks and during their holding of them one of the banks had failed, the liability created by the ownership of the stock of the failing bank would have had to have been met by the trustees from funds derived from the sale of the other, then there would have been no residuary estate to resort to. True, they might not legally invest trust moneys in such securities, but this difficulty could have been removed by the testator directing them so to invest by his will, and that, in effect, is what was done in this case. The testator took a short cut. Instead of directing the investment of a certain sum in stock of these banks, he directed his executors to hold certain stock in which he had already invested. Such being the case the legatees interested under the will in the trust fund took such interest subject to all the necessary incidents resulting from the character of the property set apart by the testator for them, and among others was this very possibility of loss by assessment as well as on the other hand the possibility of becoming more valuable during the continuance of the trust.

I am, therefore, of the opinion that these trustees must sell the Highland Bank stock and from the proceeds pay the receiver's claim and distribute the balance among those entitled under the will.

By the will the use of this bank stock was given to the testator's daughter Catherine during her life and at her death it was given to her "lawful heir or heirs * * * and in case she leave no heir or heirs at law at her death surviving her, then" such bank stock was given to certain of the testator's children. Catherine was never married and left no lawful issue. In the meantime several of the testator's children who were given a contingent interest in the bank stock have died. The interest of such as have died lapsed with their death, they not having survived the event upon which their interest would become vested, that is, the death of their sister Catherine leaving no issue. The balance of the fund will, therefore, be distributed among those surviving Catherine.

In the Matter of the Claim of J. C. HAMPTON v. THE ESTATE
OF BERTHA STOEHR, a Minor.

(*Surrogate's Court, Orange County, Filed February 1, 1893.*)

INFANTS—SURROGATE'S COURT.

The Surrogate's Court has no power to settle and determine disputed claims against an infant's estate for moneys and services alleged to have been expended and rendered in the care of the infant's property.

Proceeding to compel payment by a general guardian of a claim for services rendered by a guardian *ad litem* in litigations resulting in securing the property now held by said guardian.

John R. Devany, for petitioner; George G. Keeler, for guardian.

COLEMAN, S.—This is a proceeding to compel a general guardian to pay an alleged claim for services rendered and expenses incurred by the petitioner as guardian *ad litem* of the minor in certain litigations which resulted in securing the property now in the control of the general guardian.

The general guardian, by her answer, disputes and denies the justness and validity of this claim.

It is well settled that the Surrogate's Court has no power to hear and determine the validity of a disputed demand against an estate of a deceased person except when made by executors or administrators. And there seems to be the same lack of statutory power to determine as to claims against the estate of minors, except as it may be given by sections 2846 and 2472, subd. 7, which are hereinafter referred to.

In the case of *Welch v. Gallagher*, 2 Dem. 40, it was held that the Surrogate's Court had no power to determine a disputed claim for board and apparel of an infant.

In the Matter of *Kerwin*, 37 St. Rep. 436, it was held by the General Term, Fifth Department, that section 2846, above mentioned, gave the Surrogate's Court power to determine contro-

versies upon demands for support of minors; and under section 2472 to compel the payment and delivery of money or other property belonging to wards, and in cases specially prescribed by law to control the conduct of guardians. That was a proceeding to compel the guardian of the property to pay a third person an amount owing for the support of the minor under an agreement made with the guardian of the person; and it was there decided that it was the duty of the surrogate in that particular instance to inquire into the matter and grant or refuse the petitioner's application upon the merits. It will be noted that the circumstances "in this particular instance" were peculiar, and it very far from establishes the general principle that the Surrogate's Court is given, by the sections referred to, the general power to determine all disputed claims against a minor's estate.

By section 2472, subd. 7, the surrogate is given the power to compel a guardian to pay over money and deliver property belonging to his ward; such payment or delivery must, however, of necessity be made to a party having an established right thereto in some tribunal having authority to establish that right; and the surrogate may thereby also control the conduct of guardians, but only in cases specially prescribed by law; and there surely is no law requiring a guardian to pay a claim which he disputes until that claim has been properly adjudicated.

The demand of the petitioner in this case is not for the "support and education of the infant," but is for money and services alleged to have been expended and rendered in the care of the infant's property. Whether this was so done this court is not given the power to settle and determine, and these proceedings will, therefore, be dismissed, but without costs.

In the Matter of the Application of CHARLOTTE SHEPHERD.

In the Matter of the Application of CHARLOTTE E. CONNALL.

In the Matter of the Application of EDA L. COMINGS.

(Surrogate's Court, Monroe County, Filed March 8, 1893.)

TRUSTS—EXTINGUISHMENT OF.

A valid, active trust to continue during the lives of the beneficiaries named cannot be extinguished by the union in the same person of the right to the income for life and the right to the principal after the death of the beneficiary, viz.: where the beneficiary has purchased the interest of the remainderman.

Applications by each of the above named petitioners to have a fund held for her benefit by a trustee of the estate of Temperance S. Lewis, deceased, paid over to her as the owner thereof.

W. A. Sutherland, for petitioners; Wm. N. Cogswell, for trustee.

ADLINGTON, S.—The will of Temperance S. Lewis was admitted to probate in this county in 1878. It contained the following provisions, viz.: "I give and bequeath unto my sister, Charlotte Shepherd, the use and income of thirty (30) shares in the Western Union Telegraph Company for and during her natural lifetime, and after her death I give and bequeath the above mentioned stock to the Board of Foreign Missions of the Presbyterian Church in the United States of America, incorporated by the legislature of the State of New York.

"I give and bequeath unto my niece, Charlotte E. Shepherd, the use and income of ten (10) shares of stock in the Western Union Telegraph Company, for and during her natural life, and after her death I give and bequeath the same to the Board of Home Missions of the Presbyterian Church in the United States of America, incorporated by the legislature of the State of New York.

"I give and bequeath unto Eda L. Shepherd the use and income of twenty (20) shares of stock of the Western Union Telegraph Company, for and during her natural life, and after her death I give and bequeath the same to the Board of Home Missions of the Presbyterian Church, incorporated by the legislature of the State of New York.

"Lastly, I appoint my friend, Edwin S. Hayward, of the city of Rochester, Monroe County, executor and trustee of this my last will and testament, * * * and I hereby empower him, if he should deem it for the interest and benefit of the estate or legatees, to sell and convey the same or any portion thereof, always securing the proceeds for the benefit of and purpose hereinbefore mentioned."

The executor qualified, set apart the bequests of stocks as directed in the foregoing bequests, and after a time sold the same under the authority given him by the will.

He invested the proceeds and paid over the income to the respective beneficiaries until he was removed from office, when he paid over said funds to his successor in office, The Rochester Trust & Safe Deposit Company.

Each beneficiary for life, mentioned in the foregoing bequests, alleges in these proceedings that she has purchased the interest of the Board of Missions in the principal fund and its title thereto, and asks to have the money paid over to her as the owner thereof, divested of the trust. The legal question is the same in each case, and the applications will be considered together.

It is plain that the testator intended by these bequests to secure to the persons named a regular income for life, instead of giving them a gross sum absolutely, and that her intention will be defeated if these applications can be granted.

By the provisions of the will already quoted, there were created valid, active trusts to continue during the several lives of the beneficiaries named. *Ward v. Ward*, 105 N. Y. 68, 6 St. Rep. 798; *Marx v. McGlynn*, 88 N. Y. 358-375. And the legal question raised by these proceedings is whether such a trust

can be extinguished by the union in the same person of the right to the income for life and of the right to the principal after the death of the life beneficiary. In valid testamentary trusts of personal property like these there are three estates or interests, viz. :

1. That of the person to whom the income is bequeathed for life;

2. That of the person to whom the principal is given after the death of the *cestui que trust*.

3. That of the trustee, which involves the right to the custody and legal title to the trust property during the life of the *cestui que trust*, and also the duty of keeping the same safely invested, paying over the income regularly, and the principal upon the death of the life beneficiary, after deducting commissions.

The union of any two of these interests in one person ought not, upon principle, to extinguish the third; and the point seems to have been decided adversely to the petitioners, both by the General Term of the Supreme Court and by the Court of Appeals.

In *Greer v. Chester*, 62 Hun, 329, 42 St. Rep. 289, the testator, by the residuary clause of her will, created a trust to pay the income, rents and profits of her entire estate to her husband for life, and after his death to pay one-half of such income, rents and profits to her grandson during his life, with a direction to accumulate the other half during said grandson's life, at the termination of which there was a gift over of the entire estate with the accumulations to charitable corporations.

This residuary clause was declared invalid, and decedent intestate, except as to the trusts to pay over income during the lives of the husband and grandson. They were the only persons entitled to take the decedent's personal estate under the statute of distributions, and by reason of her intestacy become the owners of their respective shares thereof, and claimed that they should be put into possession of the property as such owners, divested of the trusts.

It was held, however, that they only took their distributive

shares subject to the trust, and that they were not entitled to the possession of an estate conditioned upon their own deaths.

Notwithstanding the union in them of the right to the income for life and the title to the principal after their deaths, the court says that the object of the testator * * * to secure the income to the beneficiaries for life against the risks of business or improvidence should be carried out.

In *Asche v. Asche*, 113 N. Y. 232, 22 St. Rep. 799, the will converted all the testator's property into personalty, and gave it all to the executors in trust to pay the income, with the exception of an annuity to his mother, to his wife for life, with remainder over to his two children, who survived him. One of the children, a daughter, died intestate after the death of the testator. The widow became, on the death of this child, the owner as next of kin of said child of one-half of her estate, and claimed, therefore, to be entitled to have that much of the daughter's part of the estate of the husband turned over to her in possession.

The court says: "It is quite clear that the widow's interest in the trust estate did not merge into the legal estate which she acquired by the death of her daughter.

"In equity the union of legal and equitable estates in the same person does not effect a merger unless such was the intention of the parties, and justice and equity require it. * * * There could be no merger because of the existence of a valid trust with the right in the trustees to the possession of the trust fund for the purposes of management and control during the life of its beneficiary. The trust must exist so long as the widow lives, and during her life there could be no merger. She has no estate in the subject of the trust; she had an interest in it as beneficiary, but it was essential to the existence of that interest that the trust estate should be maintained."

If these trusts had been of real estate to receive the rents and profits and apply them to the use of these petitioners for life, with remainder over, the trusts would have been indestructible,

and the interest of the life tenants inalienable, under our statutes, during the continuance of their several lives. *Genet v. Hunt*, 113 N. Y. 168, 22 St. Rep. 774; *Douglas v. Cruger*, 80 N. Y. 15-19; *Lent v. Howard*, 89 id. 181. And the courts have extended the same rule by analogy to the trusts of personal property. *Genet v. Hunt*, 113 N. Y. 168, 22 St. Rep. 774; *Graff v. Bonnett*, 31 N. Y. 13.

I think the applications must be denied. Orders to that effect may be entered on two days' notice.

In the Matter of the Estate of WILLIAM CORNING, Deceased.

(*Surrogate's Court, Monroe County, Filed March 28, 1893.*)

COLLATERAL INHERITANCE TAX—PERSONAL PROPERTY OUT OF STATE.

A large part of testator's estate consisted of bonds and mortgages on lands in Michigan, and notes, all held by his agent in that State. *Held*, that such property, although actually out of the State at the time of testator's death, nevertheless was in his possession and passed under his will, and hence was subject to tax under the collateral inheritance tax law.

Collateral inheritance tax proceeding.

Edward Harris, for appellants; Raines Brothers and Abraham Benedict, for county treasurer.

ADLINGTON, S.—This is an appeal from an order fixing the amount of the succession tax upon certain personal property of William Corning, deceased, which passed under his will to his three children as residuary legatees.

Mr. Corning died in September, 1891. The residuary personal estate was of the value of \$130,000, of which \$87,000 consisted of promissory notes, and bonds and mortgages, which, at the time of the testator's death, were in the hands of his agent at Saginaw, Michigan; the mortgages were upon lands in the last mentioned State.

The appellants' claim is that all of this personal property which, at testator's death, was actually beyond the boundaries of this State, is exempt from the succession tax simply by reason of its situation out of the State.

The position of the appellants appears to me to be opposed both to the statutes of the state and the decisions of the courts. Omitting such parts as are immaterial to this discussion, the statute relating to this subject in force at Mr. Corning's death is as follows, viz.: "All property which shall pass by will * * * from any person who may die * * * possessed of the same while a resident of this State * * * to any person or persons * * * shall be and is subject to a tax at the rate hereinafter specified. * * * When the beneficial interest to any personal property * * * shall pass to * * * any * * * child * * * the rate of such tax shall be one dollar on every hundred dollars of the clear market value of such property * * * provided that an estate which may be valued at a less sum than ten thousand dollars shall not be subject to such tax." Chapter 483, Laws of 1885, as amended by chapter 215, Laws of 1891.

It must be presumed that the legislature, in the corresponding sections of the various acts touching this subject, has used the same words in the same sense; and in section 22 of chapter 399 of the Laws of 1892, which is the latest deliverance on the taxation of legacies and inheritances, the word "*property*" as therein used is declared to mean "the property * * * of the testator * * * passing or transferred to those not specifically exempted from the provisions of the act, * * * and shall include all property or interest therein, *whether situate within or without this State*, over which this State has any jurisdiction for the purposes of taxation."

The State, many years ago, expressly asserted its jurisdiction to tax property of the kind here in question, in chapter 392, Laws of 1883, in the following language, viz.:

"All debts and obligations for the payment of money due or owing to persons residing within this State, however secured or

wherever such securities shall be held, shall be deemed for the purposes of taxation, personal estate within the State, and shall be assessed as such to the owner or owners thereof in the town, village or ward in which such owner or owners shall reside at the time such assessment shall be made."

Now, Mr. Corning was a resident of this State at the time of his death. He died *possessed* of these securities; that is, he owned them. The property in question passed by his will to these appellants, and it would seem, therefore, that the tax in controversy was properly imposed. The same conclusion is reached by an examination of the decisions of the courts upon the point in question.

It is an established doctrine, not only of international law, but of the municipal law of this country, that *personal property has no locality*. It is subject to the law which governs the person of its owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon its owner dying intestate. *Parsons v. Lyman*, 20 N. Y. 112; *Cross v. U. S. Trust Co.*, 131 id. 339, 43 St. Rep. 254.

This principle of law has been quite generally recognized in the different States of the Union, and in many of them statutes have been passed providing, either through ancillary administration or otherwise, for the transmission of the personal property of a non-resident decedent to the State of his domicil for distribution according to the laws of that State.

In our own courts it is held that such property passes to the legatees or next of kin, not under the laws of this State, but according to the laws of the owner's domicil. *Matter of Tulane*, 51 Hun, 213, 21 St. Rep. 191; *Matter of Enston*, 113 N. Y. 181, 22 St. Rep. 569.

In the last mentioned case the testator was a resident of Pennsylvania, and a large part of her estate consisted of stocks and bonds of foreign corporations. The Court of Appeals held that they were not taxable under chapter 483, Laws of 1885, because of the non-residence of the testator. The court says, however,

in its opinion, that taxation under that act would have been proper if the testator had been a resident of this State at the time of her death. *Id.* 176.

In the Matter of Swift, 50 St. Rep. 81-87, the Court of Appeals has recently decided the question in issue here adversely to the appellants, holding that the personal property of a resident decedent *wherever situate, whether within or without the State*, is subject to the tax imposed by the act for taxation of gifts, legacies and inheritances.

This decision overrules, in respect to personal property, that of the surrogate of New York in the same matter. 2 Connoly, 644, affirmed at General Term, 47 St. Rep. 47, and 64 Hun, 639.

In England, where statutes have long been in force for taxing legacies, etc., it was held in *Forbes v. Stevens*, L. R., 10 Equity Cases, 178, that an interest in partnership property situate in India, passing by the will of a testator domiciled in England, which will was proved in the last named country, was subject to the English legacy tax.

To like effect are *In re Ewin*, 1 Crompt. & Jerv. 151; *Thomson v. Advocate General*, 12 Clark & Fin. 1-18.

In considering a statute for taxing legacies and inheritances quite similar to ours, the Supreme Court of Pennsylvania says, *In re Bittinger's Estate*, 129 Pa. St. 338-345: "All property of the citizen within the State may be taxed, and also all such property outside the State as is drawn to or follows in law the person or domicile of the owner, such as *bonds and mortgages, money at interest, etc.*, no matter *where situate*."

The order must be affirmed, with ten dollars costs against each appellant.

In the Matter of the Judicial Settlement of the Estate of
ELNATHAN WILCOX, Deceased.

(*Surrogate's Court, Orleans County, Filed September 1, 1892.*)

1. SURROGATE'S COURT—SATISFACTION OF DECREE—ACKNOWLEDGMENT.

The satisfaction of a decree of a Surrogate's Court directing the payment of money is regulated by section 2553 of the Code.

2. SAME—CERTIFICATE.

A certificate of authority of the officer taking the acknowledgment of such satisfaction in another State, which states that such officer "was duly authorized to take the same," is not sufficient; but such certificate should specify that such officer was one authorized by the laws of that State to take the acknowledgment of deeds.

Motion to file satisfactions of decree.

Sawyer & Fitch, for executor; Whedon & Ryan, for legatees.

SIGNOR, S.—In this matter certificates of satisfaction of the decree which directs the payment of money are filed by several parties. These certificates are executed out of the State and acknowledged before a notary public, and have attached thereto a certificate of the county clerk which certifies that the officer taking the acknowledgment is a notary public duly commissioned, etc., and "is duly authorized to take the same," but does not certify that the officer was authorized by the laws of the State where taken *to take the acknowledgment of deeds*.

The question has arisen so frequently in this court as to the proper manner of satisfying a decree, that I deem it important to review the provisions of the Code and the practice, in the matter of the satisfaction of decrees of this nature in the Surrogate's Court. The decree must be satisfied as if it was a judgment of record. Code of Civil Procedure, section 2553. McClellan's Surrogate Practice, p. 518 (3rd ed., 1888), gives Laws of 1867, chapter 782, section 9, as the authority for the satisfaction of a decree, but this act was repealed by the general

repealing act of 1880. That act provided that a decree might be satisfied, on filing a release "acknowledged or proved as now required as to a conveyance of real estate." It has been suggested that section 2553 applies only to decrees that have been docketed in the county clerk's office and become practically a judgment of the Supreme Court. It will be found, however, that this section contains the only provision in regard to such satisfactions, and in their notes the codifiers say: "A clause in the last sentence of this section supersedes Laws 1867, chapter 782, section 9."

From this it appears that the intention was to make the clause applicable to all such decrees, whether docketed or not. Section 1260 of the Code provides for the satisfaction of a judgment, and the last part of the section provides that, when not acknowledged by the clerk or his deputy, the satisfaction "must be acknowledged or proved and certified in like manner as a deed to be recorded in the county where it is filed." The provisions for the taking of acknowledgments of such instruments outside of the State are found in Laws 1848, chapter 195, sections 1 and 2, as amended by Laws 1867, chapter 557. (See 3 Birdseye's R. S. 2550, sec. 8.) This act provides that "the proof or acknowledgment of any deed, or other written instrument required to be proved or acknowledged, in order to entitle the same to be recorded or read in evidence, when made by any person residing out of this State and within any other State or Territory of the United States, may be made before any officer of such State or Territory authorized by the laws thereof to take the proof and acknowledgment of deeds." The following section provides that the same may be recorded or read in evidence when the proper officer attaches his certificate "specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same."

The certificates before the court are in a form frequently used, and certify that the officer before whom the annexed instrument was acknowledged was a notary public, etc., and "was duly authorized to take the same." If the instrument was a deed, this would be in effect certifying that he was, by the laws of

that State, authorized to take the acknowledgment of deeds, but it does not follow that, because by the law of the foreign State he was authorized to take the acknowledgment of the satisfaction of a decree in Surrogate's Court, he was authorized to take an acknowledgment of deeds. Nor will this be presumed. *Bowen v. Stilwell*, 9 Civil Pro. 281.

It has been suggested that these certificates follow the words of the statute, and therefore are sufficient, but it will be observed that the statute does not say *certifying* that he was authorized to take the same, but "*specifying* that he was authorized to take the same." It is not to be presumed that the county clerk of a county, outside of the State, is to certify that, by the laws of the State of New York, an officer of his State was authorized to take acknowledgments, but he may *specify* enough to warrant the court here in determining that he had the authority. This authority must be derived from the laws of this State. *Ross v. Wigg*, 34 Hun, 192.

The fact that he was authorized by the laws of the State where he resides to take acknowledgments of deeds would not authorize him to take the acknowledgment of these instruments. His entire authority, so far as his acts in this respect are concerned, is derived from our statute. The statute of this State might have provided that any attorney residing in that State might take the acknowledgment. The *specifying* required by the clerk is, that the officer taking is one that is authorized by the laws of that State to take acknowledgment of deeds, as, in the other case, it would specify that the person taking was an attorney residing in the State, while, on the other hand, the certifying that the officer was authorized by the laws to take acknowledgment to a satisfaction of a judgment does not *specify* him as an officer authorized by the laws of the State to take the acknowledgment. For this reason, that he is not specified, designated or pointed out as one having the required authority, the satisfactions cannot be filed until they are returned and the clerk *specifies* that the officer taking the acknowledgment was authorized by the laws of that State to take the proof and acknowledgment of deeds.

In the Matter of the Judicial Settlement of the Estate of JOHN
SNYDER, Deceased.

(Surrogate's Court, Columbia County, Filed November 28, 1891.)

1. WILL—CONSTRUCTION.

Testator, by his will, made a complete division of his property. By a codicil he gave to his wife and two daughters certain real and personal property in trust to continue his business for three years from his death, or, in their discretion, for five years. He gave authority to use part of the trust fund to pay the specific legacies, gave instructions as to the management of the business, and for distribution at the termination of the trust, and then authorized his wife "to collect all my interest money and rentals of my property during her lifetime, or until the estate is finally settled, and apply the same to her own use." The personal estate not embraced in the trust was insufficient to pay the legacies. *Held*, that the last provision of the codicil referred to the income and rentals of the trust estate, and did not authorize the widow to take the interest and rentals of the estate not placed in trust.

2. SAME—TRUST.

The trust attempted to be created by the codicil was void, because limited by a period of years, and not upon lives.

Judicial settlement of the accounts of the executrices and executors under the last will and testament of John Snyder, deceased.

G. S. Collier, for Mercy Snyder, Lillie E. Gillett and Jennie A. Lent, executrices, and James M. Gillett, executor, and Mercy Snyder, as widow of deceased; A. Frank B. Chace, for trustees; E. R. Harder, for James E. Snyder, one of the executors, and a legatee and devisee under the will of said deceased; Burgess Speed, special guardian for infant legatees.

COLLIER, S.—The settlement of the accounts in this matter involves the construction of the last will and testament, and codicil thereto, of the said deceased. A proper and legal construction must first be determined upon and settled before any decree can be made for settlement.

John Snyder died on or about the 4th day of July, 1889. He left a last will and testament, which bears date December 30, 1885. He made and executed a codicil to said will, which bears date the 12th day of May, 1889. The will and codicil were proven and admitted to probate by the surrogate on the 11th day of July, 1889, and letters testamentary thereon were issued to Mercy Snyder, Lillie E. Gillett, Jennie A. Lent, James M. Gillett and James E. Snyder, the executrices and executors therein nominated and appointed. By the will of said deceased, dated December 30, 1885, the testator, after making provision for a monument, by the third clause of said will gave and bequeathed to his wife, Mercy Snyder, the sum of \$12,000 in cash, and devised to her absolutely his private residence in Valatie, in the town of Kinderhook, and all the lands belonging thereto, containing about eight acres, and also all the personal property attached thereto, such as household furniture, carpets, beds and bedding, horses, carriages, sleighs, robes, harness, and all the personal property of every description in and about his private residence, and this provision for his wife, in and by the fourth clause of said will, is declared to be in lieu of her right of dower.

By the fifth, six and seventh clauses of his will he gives and bequeathes to each of his three children the sum of \$8,000, and by the eighth clause states that his children and his wife are to have the above sums in cash as soon as practical after his decease. By the ninth clause of his will the balance of his personal property and real estate is to be appraised, and he directs that it shall be divided equally between his three children, and by the tenth clause he gives to each of his grandchildren \$400, *to be taken out of the real estate before it is divided.*

In this plain and simple manner he disposed of his whole estate by his will. But some time after making his will, and on May 12, 1889, the testator made a codicil to said will, and after reciting the fact of the making of said will, and the fact that in and by it he had given and bequeathed the balance of his personal property and real estate as stated in the ninth clause of

said will, and directing that the codicil should be taken as a part thereof, he proceeds in substance as follows: "To order and declare, give, devise and bequeath to his wife, Mercy Snyder, and his daughters, Lillie E. Gillett and Jennie A. Snyder (now Jennie A. Lent), in trust for the uses and purposes hereinafter named," certain real estate, describing it, then in use in his business of manufacture and sale of tinware, rags, junk, iron, glass, etc., and certain other real estate, describing or designating it, also gives, devises and bequeaths to his said trustees, in trust, as aforesaid, for the uses hereinafter mentioned, all his horses, carts, wagons, harness, sleighs, goods, chattels, credits and merchandise, which then was, or shall be in use as a part of the business conducted by him, and also that of the moneys on deposit to his credit, the sum of \$3,000 be taken by his trustee or trustees, and used by her or them for the uses and purposes hereinafter mentioned, and as a part of the trust created by this codicil; and directs his trustee or trustees to use the property mentioned for the purpose of carrying on the business of the manufacture and sale of tinware, rags, junk, iron, glass, etc., as then conducted by him, for the term of three years from and after his death, or, if in the discretion of his trustees it may be deemed advisable for the best interests of his estate, such business and such trust may be continued until the expiration of five years after his decease; and directs that his wife, Mercy Snyder (one of said trustees named), shall act as sole trustee, with power to sign all checks until the termination of the trust, or until her decease, but in the event of her death before the termination of the trust, then, and in that event, his daughters (the other trustees named) shall act as trustees until the termination thereof, and directs and orders that the property therein mentioned should, upon his decease, be set apart from the residue of his estate for the purpose of carrying on such trust, and his trustees are directed to use no part of his property other than the property therein devised in connection with such business. That all other property of which he might die seized or possessed should be kept separate and apart from such trust

estate, and should vest upon his decease in the legatees named in his said will and testament as therein provided.

Upon the termination of the trust, the trust estate should be disposed of for the payment of any unpaid legacies given by his last will and testament, and the residue and remainder be divided equally between his son, James E. Snyder, and his daughters Lillie E. Gillett and Jennie A. Snyder, now Jennie A. Lent.

And the testator in this same clause of the codicil directs his trustees, in their discretion, to use from his trust estate, before the termination of the trust, such sums of money as they may deem advisable for the payment of the specific legacies given by his will, and the said legacies for which there is not sufficient property outside of such trust estate to pay shall, in the option of the trustees, not be payable until the termination of the trust, and then, following in the same clause, directs his trustees to employ Thomas Garrigan as superintendent of the business created by the trust, and James M. Gillette as assistant, at certain salaries during the period of such trust. Directs that an inventory of the property covered by the trust be made at least once each year, and delivered to his wife. And then, following right on, in this same clause the testator says: "I further authorize and empower my said wife as aforesaid to collect all my interest money and rentals of my property during her lifetime or until the estate is finally settled, and apply the same to her own use." Such now are the provisions of the will and codicil which, taken together, stands as the last will and testament of said deceased.

By the account filed it appears that the estate, outside of the property and money so given in trust, amounted to about the sum of \$23,678.51, besides certain real estate not given in trust.

And it is claimed by the widow that under the will and codicil she is entitled to the whole income of the estate until the trust estate is finally settled.

And by James E. Snyder that she is only entitled to income and rental until the estate in the hands of the executors should have been finally settled by law. The trustees claim that the

widow is entitled to the income and rental of the property so placed in trust during her life, but not exceeding the time limited by the trust; all claiming under that clause in said codicil wherein he authorizes and empowers his wife to collect all of his interest moneys and rentals of his property during her lifetime or until the estate is finally settled, and apply the same to her own use.

Now, leaving the question of the validity of the trust out of question, in order to get at the intent and meaning of the clause, we must assume that the testator by his codicil intended to create a valid trust. What the intention of the testator was must be gathered from the will and codicil, and the language used should be so construed as to give effect to the intention of the testator as gathered from the whole will and codicil taken as one instrument.

Now by the will the testator disposed of his whole estate, without any conditions or limitations, except that certain legacies given to his grandchildren were to be taken out of the real estate before it should be divided. At the time this codicil was made the testator had by his will devised to his wife certain real estate and bequeathed to her \$12,000, which he declared to be in lien of dower, and to each of his three children \$8,000, and that they were to have the same in cash as soon as practicable after his death. And but for this trust created by the codicil there would have been more than sufficient personal estate to pay all the legacies; and by the ninth clause of his will he directed that the balance of his personal estate should be appraised and equally divided between his three children.

By the codicil he takes or carves out of this real estate certain parcels thereof, and takes out of his personal estate certain personal property and money, and gives, devises and bequeathes the same to his wife and two daughters (all living at the time of his decease), in trust for carrying on the business he, the testator, had during his lifetime successfully conducted. This appears to have been the sole purpose and aim of the testator, and his intention was that the balance of his personal estate should be

applied in payment of the legacies to his wife and children as directed in and by his will, and that the balance of the real estate not placed in trust should go as directed by said will equally to his three children, and that the personal estate not placed in trust should, by his executrices and executors, be applied in the proper and legal course of administration to the payment of his debts and said legacies given by said will.

By the codicil he directs that the trust property shall be set apart from the residue of his estate, and that all other property of which he might die seized or possessed should be kept separate and apart and should vest upon his decease in the legatees named in his said will, as therein provided, clearly showing that he intended that the balance of his property not placed in trust should not be affected by the provisions of the codicil, but plainly indicating his intention that it should pass under the will and be distributed under the provisions of said will, and this is further indicated by the further provisions of the codicil for the payment of unpaid legacies given by his will, and the discretionary power given to the trustees to pay out of the trust estate such sums of money for the payment of such specific legacies given by his will for the payment of which there should not be sufficient property outside of such trust estate to pay the same.

It will be noticed that by the provisions of the codicil creating the trust, the testator, though naming three trustees, uses the language my beloved wife, Mercy Snyder, shall act as sole trustee herein, makes no provision for compensation for her or for the trustees for carrying on the business, and makes no disposition of the income and rentals from the trust property, unless this clause in question, to wit:

"I further authorize and empower my wife aforesaid to collect all my interest moneys and rentals of my property during her life or until the estate is finally settled and apply the same to her own use" refers to such trust income from the business to be carried on and the rentals of the real estate devised in trust, but not in direct use in carrying on the business. This codicil, though ratifying and confirming the provisions of his will as to

all property not placed in trust, clearly relates to the creation, management and disposition of this trust estate, and this language above quoted, following the provisions for the management and disposition of the trust estate, clearly seems to relate to the income and rentals from such trust estate. To say that under this clause the widow was entitled to the interest money and rentals of the estate not placed in trust during her life or until the final settlement of the trust estate, would be entirely inconsistent with the provisions and directions of the will, ratified and confirmed as they are by the codicil. The whole intention of the testator, as expressed in this codicil is, that the personal estate not placed in trust should be applied to the payment of the legacies, given and bequeathed in and by his will, to his widow and three children, and in the manner directed by his will, and that each of his children and his wife should have the sums given to them in cash as soon as practical after his death; that it should vest, as stated in the codicil, in the legatees named in his will upon his decease, as therein provided. And the provision also in said codicil for the payment of the legacies for which there should not be sufficient property outside of such trust estate to pay, clearly shows that the testator had no intention of tying up the estate not placed in trust till any final settlement of his estate, by any provision that his wife should collect all interest moneys and rentals during her life, or until the estate is finally settled, and apply the same to her own use. I am strongly of the opinion that it was intended to refer to, and does refer to, the income and rentals from the trust estate, and that his widow, Mrs. Snyder, would be entitled to the same if the trust was valid, and that the testator did not intend to give, and the language used should not be so construed as to give, the widow the interest money or any rental of any property outside of the trust estate, except that she would be entitled to interest on her legacy of \$12,000, bequeathed to her by the will.

It appears from the account that there was some \$18,787 in personal property and \$3,000 in cash, besides certain real estate of considerable value, given and devised by the codicil in trust.

This is not accounted for by the executrices or executors, except in a general way by stating that it was set apart, under the provisions of the will of said John Snyder, for continuing the business carried on by the testator at his decease. It is claimed that all this personal estate should be accounted for by the executors at this time and distribution of the same should now be made, for the reason that the trust created by the codicil is void. That there is an illegal suspension of the absolute ownership of the property so given in trust, as it is not limited upon a life or upon two lives in being at the death of the testator, but upon a definite period of time. This question arises on this accounting, and must be determined and settled before any proper disposition or distribution of the personal estate left by the testator at the time of his death can be properly made. For if the trust is void, then all of the personal estate of the deceased, including all of the personal property attempted to be given in trust, should now be accounted for, and distribution thereof made as directed by the will of said deceased.

By the terms of the codicil certain personal property amounting to about \$18,787 and \$3,000 in cash is given to Mercy Snyder, Lillie E. Gillett and Jennie A. Snyder in trust, and he directs his trustee or trustees to use the property for the purpose of carrying on the business of the manufacture and sale of tinware, rags, junk, iron, glass, etc., as then conducted by the testator, for the term of three years from and after his decease, or if in the discretion of his trustees it might be deemed advisable for the best interest of his estate, such business and such trust may continue until the expiration of five years after his decease.

No provision is made for the termination of the trust short of three years from the day of the death of the testator, and after three years it is left discretionary with the trustees to continue it until the expiration of five years. Clearly a trust is created by this codicil by which the possession of personal property and the legal estate therein would be vested in the trustees during the continuance of the trust, and the absolute

ownership of personal property be suspended within the meaning of the statute. The trust is absolutely and unconditionally for a period of three years, and is not founded on lives. Not upon the life of his widow, or any one, nor upon the lives of any two persons in being at the time of the death of the testator. The codicil creates but one trust, and that is for a definite period, three years. No part can be cut off, and no part disregarded for the purpose of rendering the trust valid for any purpose, or for the life of the widow, or any other person. *Haynes v. Sherman*, 117 N. Y. 433, 27 St. Rep. 254; *Schettler v. Smith*, 41 N. Y. 328; *Underwood v. Curtis*, 40 St. Rep. 255. As is said by Coffin, surrogate, in *Will of Underhill*, 6 Dem., at page 469: "To render such suspension valid, it must be limited on a life or lives. It is difficult to conceive how a limitation of three years may not be longer than until the termination of the lives of any two beings in existence at the death of the testator. To render such future estates valid, they must be so limited that, in every possible contingency, they will absolutely terminate at such period, or they will be held void." It must now be considered as settled by the authorities of this State that a trust of real or personal property for a definite term of years, not founded on lives, will not satisfy the statute, and is void.

The trust created by this codicil, in so far as it relates to the personal estate of the testator, must be and is declared void, and the personal estate so attempted to be placed in trust must be disposed of and accounted for by the executors and executrices under the will of said testator. And as such personal estate has been used and employed in the business carried on by the testator at the time of his decease, all income and profit, if any, should be accounted for, in order that a proper distribution thereof may be made. A decree should now be made for distribution of the money and property mentioned and accounted for in and by the account filed, and for the application thereof (after the proper deductions for commissions and payments of the costs of this accounting up to this date), to the payment of

the legacies given in and by the will of said deceased, to the widow and three children of the deceased, and upon the entry of the said decree this matter should be adjourned to some future time, and the executrices and executors ordered and directed to proceed with due diligence in the meantime and dispose of the merchandise undisposed of, personal property so attempted to be placed in trust, except said \$3,000 cash, which should be included in the present disposition.

In the Matter of Proving the Last Will and Testament of
FRANCES E. PURDY, Deceased.

(Surrogate's Court, Orange County, Filed January 27, 1892.)

WILL—PROBATE.

Two instruments, complete in form, upon a four page blank, were offered for probate. One disposed of money and specific articles, and the other of specific articles alone. They were drawn by testatrix, and were the same in all respects except as to the legacies, and were not dated. The subscribing witness testified that one was executed some months before the other, but she had only an impression as to which was executed first. It appeared that after one was executed testatrix received property from her sister which consisted wholly of household furniture. *Held*, that as the will bequeathing articles alone was not a complete disposition of testatrix's property, it must be deemed the last one executed and the clause of the revocation ignored under the circumstances, and that the will disposing of money should be admitted as the will of testatrix and the other as a codicil.

Proof of will.

B. R. Champion, for petitioner, a legatee, the executor being dead; C. W. Coleman, special guardian, for minor next of kin; J. B. Sweezy, special guardian, for minor legatees.

COLEMAN, S.—Frances E. Purdy died on the 13th day of October, 1891, a resident of the city of Middletown, in this county, having an estate of about \$5,000, all personal property.

Two instruments, upon a four page sheet of paper, each instrument in form a complete will, are offered for probate as the will of the deceased.

Upon one page and its reverse is printed the usual blank form of a will, and upon the succeeding page and its reverse is another printed blank form of a will. The two leaves of the sheet have never been torn apart. The only portions of each printed form that are filled in are the large spaces following the printed words, "First, after all my lawful debts are paid and discharged, I give and bequeath," the blank left for the name of the executor and the blank for the year. In the first of these spaces in each instrument is a list of legacies; in one seventeen legatees are named and five in the other, four of them occurring in both instruments. The same executor is named in both, and both bear date the — day of —, 1891. Each instrument is a copy of the other except the portion containing the names of the legatees and description of the legacies. In the instrument naming seventeen legatees, there is a legacy of \$500, two of \$400, one of \$300, several of \$200, \$150 and \$100, amounting in all to the sum of \$2,600. The remaining legacies are of specific articles, principally of household furniture. In the other the legacies are all of specific articles of household goods and are of articles not mentioned in the other. Both instruments have in the printed portion the usual clause revoking all former wills.

The subscribing witnesses are the same to both instruments, one of them being now dead. The surviving witness in both cases filled in the blanks left in that clause in the printed form. This witness testifies that one was executed several months before the other, but she is unable to tell which one was executed first; she thinks, however, that the one giving a gilt mirror was executed last, because she thinks the deceased did not have the mirror at the time the first instrument was executed. The instrument in which the gilt mirror is given is the one containing the gifts of money. The deceased and both witnesses were women well advanced in life, and there is no evidence that

either of them had any previous experience in such matters, or that either had any knowledge of the legal requirements for the preparation and execution of a will.

The subscribing witness testifies that the deceased, before the execution of the second instrument, said: "I have changed my will; I have added to it, and I want you to come and give me your signature again;" she also testifies that the testatrix said at the time of the execution of the last instrument, "this is another part of my will, an addition; I have some other things to will away."

The only provision in either instrument in the nature of a residuary clause is found in the one giving legacies of money, and occurs near the end of the written part, and after the gifts of money. It is as follows: "After all my debts are paid, the remainder of the money to be equally divided between the different *heirs mension* in the will of money." Then follow other legacies of specific articles.

The written portion of the other instrument, after the printed words "I give and bequeath," reads: "The following articles to my different nieces *mention* in this will;" then follow legacies of specific articles of household goods to five persons, and these legacies are the only provisions in this instrument relating to property.

It is laid down as settled law in Wms. on Exec., page 166: "If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate. But in every case the courts will struggle to reconcile them if possible, and collect some consistent disposition from the whole."

The evidence of the surviving subscribing witness establishes beyond question that these two wills were not executed at the same time, but she only has an impression as to which was executed first. I am satisfied that the witness is wrong as to this fact. It is altogether more probable that the testatrix executed

first the instrument in which there is apparently a complete disposition of her estate; especially in view of the fact, which is conceded to be true, that the property received by her from her sister after the execution of the first instrument consisted largely of household furniture, and did not greatly augment her estate, and this is in harmony with the remark made by her at the time of executing the second instrument that she had some other things to will away. Parol evidence of these facts was admissible, as it related to an ambiguity upon the factum of the instruments. *Wms. on Ex'rs*, 353.

This being true, then it results, if full force is given to all the provisions of the second instrument, particularly of the clause revoking all former wills, that the first or principal will is revoked and the latter, which only makes a partial disposition of the estate, will be substituted in its place, thus leaving the deceased intestate as to the greater portion of her estate. A careful reading of the disposing portions of the two instruments and the remarks made by the testatrix at the time of the execution of the second, will, I think, show that such was not her purpose, but rather that one instrument was to supplement the other. This purpose, if possible within the provisions of the law, should be sustained.

Courts do not confine the testamentary disposition to a single instrument, but they will consider several, of different natures and forms and dates, as constituting together the will of the deceased. The form of an instrument is not controlling; it may be intended for a deed and yet operate as a will. And a subsequent will does not necessarily work a total revocation of a former one unless the latter expressly or in effect, by being inconsistent with it, revoke the former. These are well settled legal principles; I have, however, been unable to find a case in which an instrument containing an expressed revocation of former wills was held not to revoke such former wills.

It is a maxim that "no man can die with two testaments;" and Sir H. J. Fust in *Plenty v. West*, 1 Robert, 264, said that he knew of no case where a testator called a will "his last will,"

in which the court held former papers to be included. The authority of this case, at least to the extreme point to which the law is there carried, has been questioned. Wms. on Ex'rs, 163, note c.

It was held in *Nelson v. McGiffert*, 3 Barb. Ch. 158, that when a later will is inconsistent with a former will in some of its provisions merely, it is only a revocation *pro tanto*. See also *Brant v. Willson*, 8 Cowen, 56; *Newcomb v. Webster*, 113 N. Y. 191, 22 St. Rep. 955; and in *Harwood v. Goodright*, Cowp. 87, Lord Mansfield said: "If there is a complete second will, it cannot do otherwise than revoke a former will; but if it is only a variation or subtraction from a former will, it is in the nature of a codicil." The very meaning of the word codicil, as now used, is something annexed or added. Wms. on Ex'rs, 8.

In *Thomas v. Evans*, 2 East, 488, the testator made his will whereby a complete disposition of his property was made. Subsequently he acquired an interest in other real estate, and then made another will, which read: "This is the last will and testament of me," etc., etc., and therein devised his interest in his subsequently acquired real estate, and concluded the will with these words: "As to the rest of my real and personal estate, I intend to dispose of the same by a codicil to this my will hereafter to be made." The testator died without making the codicil. Held, "it is not enough to say that by making this will in terms large enough to include all his property, he must therefore have meant to revoke his former will, unless it be shown that he has made a disposition of this property inconsistent with it, * * * but even if this had imported an intention to revoke by making a different disposition in the future, it would not have amounted to a revocation." Both instruments were admitted to probate, as together constituting the will of the deceased. And in *In the Goods of Astor*, L. R., 1 P. Div. 150, a late case in England, where an American had, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, had disposed

of moneys invested in the British funds, the second will was admitted to probate as part of the testator's will. See also *Ex parte* Lord Ilchester, 7 Ves. 372.

There must always be an intention to revoke. Acts which of themselves would ordinarily indicate an intention to revoke may be proved not to have been so intended; as when a testator set about to destroy his will, and had actually partly torn it, but was persuaded from completing the destruction of the instrument; or having two wills, the testator unintentionally destroyed the wrong one, or the will was accidentally destroyed. So, also, conversely, where by a statute a previously made will is revoked by certain acts of a testator, as in the case of a single woman who, having made her will, subsequently marries, a publication of a codicil to the will subsequent to the marriage republishes and establishes the will. *Brown v. Clark*, 77 N. Y. 369.

The cases cited, while not directly in point, however, do show the purpose of the courts to ascertain and as far as possible to carry out the intentions of testators. There probably has not arisen in the courts a case similar to the one now presented and could not very well have arisen until the present day of printed blank forms of wills. It is quite probable that Miss Purdy, having procured the blank form, in her inexperience gave very little attention to the printed portion of it, but confined her attention, rather, to what was necessary to be written to show her wishes in regard to the disposition of her property, supposing, as she might reasonably do, that if this was plainly stated the rest was unimportant. And it is in this view of the case that I have concluded that it is proper to ignore that part of the second instrument in which it is stated that all former wills are revoked, also having in mind the familiar legal principle that where words of a particular legal meaning are used by an unskilled person, in a different or even opposite sense from that ordinarily given them, that meaning and effect will be given them by the court which it is evident they were intended to have.

The instrument in which legacies of money are given will, therefore, be admitted as the will of the deceased, and the other as a codicil thereto.

In the Matter of the Estate of MARY SWEETLAND, Deceased.

(*Surrogate's Court, Madison County, Filed January 14, 1892.*)

COLLATERAL INHERITANCE TAX—PARENTAL RELATION.

The deceased was a co-tenant of certain property with her sister, the mother of petitioners, and resided thereon with her sister's family until her sister's death, without any agreement as to board or payment of rent. After the sister's death she continued to reside there in the same manner. After their father's death the petitioners continued to work the farm in the same manner as formerly and deceased continued to reside with them until her death. *Held*, that this was not sufficient to constitute the relation of parent and child between them so as to justify an exemption from tax upon the property received by them from her.

Proceeding for collateral inheritance tax.

M. H. Kiley, for petitioners; J. A. Johnson, for the people.

KENNEDY, S.—This is a proceeding to show cause why a decree should not be made adjudging that the real and personal estate passing to the petitioners, Floyd Greenman and Henry Greenman, nephews of deceased, be not subject to taxation under chapter 483 of the Laws of 1885, and the several acts amendatory thereto.

The two nephews make this application for exemption from the payment of the tax on the ground that for a period of not less than ten years prior to the death of their aunt, Mary Sweetland, they stood in the mutually acknowledged relation of parent and children.

The facts upon which the application is based are as follows: Mary Sweetland was never married, and from the earliest recollection of the petitioners had made her home a part of the time with her parents, and some of the time with others. Upon the death of Miss Sweetland's mother, her heirs agreed upon a settlement of her estate, by which the mother's farm in Cazenovia became the property of Miss Sweetland and her sister, Mrs.

Greenman, the mother of the petitioners. Some time previous to the death of Mrs. Sweetland, Mr. and Mrs. Greenman moved onto and carried on her farm for her, and after her death continued to occupy said farm till their death, since which time the two petitioners have occupied and managed said farm till the death of their aunt, receiving and using the entire avails of it without objection from Miss Sweetland, and paying her no compensation for the use of her half of the farm, and having no agreement with her in relation to it. Upon the death of their mother, the two boys became the owners of an undivided half of the farm in question, and by the will of their aunt were made legatees of the other half of it, and all of her personal estate, amounting in all to about \$4,000. Mrs. Sweetland died in 1879; Mrs. Greenman July 28, 1879; Mr. Greenman March, 1881, and Miss Sweetland November 3, 1889, aged sixty years. Henry is now thirty-eight years old, and Floyd thirty-one, and they claim that the relation of parent and child existed between themselves and their aunt from the death of their mother, July 28, 1879, to the death of their aunt, November 3, 1889, a period of about ten years and three months, notwithstanding the fact that their father did not die till March, 1881, leaving only a period of eight years and eight months for the relation to exist after the death of their father, provided such a relation did or could arise and have a legal existence by reason of any facts proven in this proceeding. The petitioners, during the life of their parents, have always lived at home with them and assisted their father in farming, and never were engaged in business elsewhere upon their own account. After the father's death the aunt and both nephews lived together in the same house for a few years, but subsequently Floyd married and built a house upon the farm, and thereafter lived separate from the aunt, leaving Henry and the aunt in occupancy of the old home till her death.

The application must be denied, because we think the law to be that if a child continues to live at home with his parents after he has reached his majority the relation of parent and child,

theretofore existing, will be presumed to remain unsevered, until by decisive and affirmative acts on the part of the child or parent his freedom and emancipation from such relation is claimed and asserted by him. Assuming this to be the law, the fact that some relative or other person lives in the same family as housekeeper or discharges many of the household duties ordinarily performed by a mother, or is treated and regarded as one of the family by a surviving husband and children who have reached their majority, is not of itself sufficient to create that parental relation which the law recognizes as necessary to justify an exemption from the tax in question.

A less stringent and different rule should apply in case of minor children because of their lack of legal right to fix their relation with others, their real or supposed lack of that judgment and discretion which is necessary to determine what is best for them, their dependence upon others for their care, education and maintenance, and the duty of the public, the courts, and of private individuals to provide for those whose helpless situation makes parental care necessary for them. So, too, there may be other special and peculiar circumstances arising from social, family or business relations, or from other causes and conditions in life, which would satisfy the court that it had the legal right to infer the existence of parental relations. Again, if a father or mother dies, leaving children either over or under their majority, who have always lived at home, and the surviving parent remarries, such children and stepfather or stepmother, as the case may be, if they continue to recognize the relation of parent and children to exist between them as ordinarily exhibited in families, the relation of parent and child would be presumed to exist until the contrary was proven, and such child or children, in cases of a legacy from the stepfather or stepmother, would be exempted from the payment of the inheritance tax. Within the rules of law above stated, we think the petitioners would be exempt from the payment of any tax upon the legacy to them if their father had married his wife's sister and they had continued to live at home with their aunt

as their stepmother for the period of ten years in the manner in which they have lived, but we do not think the parental relation which the statute contemplates could commence in this case till the death of Mr. Greenman, a period of time too short to give the petitioners the benefit of the statutory exemption.

Having stated the rules of law applicable to proceedings of this character, we call attention to some facts in this case in support of the conclusion we have reached. It appears that Mr. Greenman occupied and worked the farm in question from the death of Mrs. Sweetland in 1879 till his death in 1881, without any agreement with Miss Sweetland in regard to rent or payment in any form for the use of her half of it, and that during all this time she remained a member of the family, living with Mr. Greenman and his children without any agreement or understanding with reference to paying for her board, and upon his death the petitioners continued to carry on the farm till the death of their aunt in the same manner as their father had done, rendering her no account of its avails and paying her no compensation therefor, she continuing to live in the house in the same manner as she had done during the lifetime of Mr. and Mrs. Greenman. From the time Miss Sweetland and sister became the owners of the farm upon the death of their mother there was no change in the manner of conducting the farm or in the mode of living as far as she was concerned. The aunt and the children each treated and cared for the other the same as they had always done.

Ever since the nephews were born she had made her home principally with their parents, had eaten at their table and been one of the family for more than thirty years, and we assume she took an active interest in all family matters and assisted in all the varied duties of the household. But the relation of parent and children requires something more than living in the same house and family under the circumstances shown in this case. Miss Sweetland and her sister were tenants in common of the farm, and after the death of Mrs. Greenman she was a like tenant with her nephews, and as such we assume she was occupy-

ing the house and was not there by reason of a license or permission from the other owners, but was in possession and living in the house by virtue of her legal right so to do, a right which could not be denied or taken from her. No act or agreement is proven by the nephews that they or their parents were ever in the exclusive possession of the farm, and it will therefore be presumed that the residence of the aunt in the house and all her relations with her nephews were, so far as business affairs are concerned, as a tenant in common with them, and not the relation of parent and child, at any time.

Her life and theirs upon the farm were simply the assertion of the mutual rights which each had in the real property. The fact that she never received any of the avails of the farm would indicate that they were retained in payment for her board and services rendered in her behalf, because Mr. Greenman or her nephews would not probably have retained this income unless they had a right so to do for some purpose or reason mutually satisfactory to all.

The counsel for the petitioners rely upon the opinion of this court in the Matter of the Spencer Estate, 21 St. Rep. 152, in support of the claim from exemption, but the facts of the two cases are so widely different that the conclusions of law therein maintained do not apply to this case.

The application of the petitioners will, therefore, be denied, and an order entered appointing an appraiser of the estate of Mary Sweetland.

In the Matter of the Probate of the Will of SAMUEL WILCOX,
Deceased.

(Surrogate's Court, Monroe County, Filed June 23, 1892.)

WILL—ALTERATIONS BY TESTATOR—EFFECT OF.

An interlineation, erasure or other alteration made in a will, either by the testator or a stranger, after due execution of the instrument,

without a new attestation, does not avoid the instrument, but the court may disregard the same and probate the will according to its original language, when that can be ascertained.

· Probate of will.

Hubbell & McGuire and C. A. Shuart, for the proponents;
John Van Voorhis and C. D. Kiehel, for the contestants.

ADLINGTON, S.—The question of the due execution of this will has been heretofore settled by the courts, and the only point now remaining to be determined arises out of certain alterations and erasures appearing on the face of the instrument. In two clauses of the will, in which legacies of \$7,000 were given to the relatives of the testator, the letter “s” has been erased and the letters “el” substituted therefor, thus changing the amount of the legacies from \$7,000 to \$11,000. In another bequest the words “the use of” have been interlined, though the change is not really material. This interlineation and the substitution of the letters “el” for “s,” just mentioned, have been done with a different ink from that with which the body of the will was written, and there is also much doubt whether the handwriting in which these changes were made is the same as that in which the rest of the instrument is written.

The fifth clause of the will originally read as follows: “I give and bequeath to my sister, Mary Rich, the use of seven thousand dollars during her life time, to be invested in bond and mortgage on unencumbered real estate under the direction of my executors herein named in trust, and after her decease goes to her daughter Susan Richards, under the same directions as enjoined on Mary Rich during the life time of Susan Richards; *after her decease it shall go to her children in equal shares.*”

At some time the words at the end of said clause, here put in italics, have been erased, and can now be read only from the marks of the pen upon the paper, the ink having been wholly scraped away. The contestants allege that these alterations in

the will were made after its execution by a person claiming under the instrument, and that the legal effect of the change is to avoid the will. In view of the fact that the alterations were not noted at the bottom of the will, and were of a nature to excite suspicion, the proponents were called on to give such evidence as they had as to when and by whom the alterations were made; and the contestants then gave testimony in support of their allegations as to the changes in the will. *Crossman v. Crossman*, 95 N. Y. 153; *Williams v. Ashton*, 1 Johns. & Hem. 115.

On the evidence adduced I held that the alterations had been made since the execution of the will, either by the testator or by some person unknown, but not by the person charged by the contestants with the offense. The legal question to be decided is, therefore, what is the effect of material alterations in the will, made after its execution either by the testator or a stranger? It is a well settled rule of law that a material alteration in a deed, or other written contract, which has been duly executed and delivered, made without the knowledge or consent of the party bound thereby, avoids the instrument as against such party. It is obvious, however, that there is a wide difference between a deed, or ordinary contract, and a will. The execution and delivery of a deed, or contract, fixes irrevocably the liability of the grantor or obligor; but the execution of a will places no obligation or liability upon any one, nor does it confer vested rights upon any one. The testator may revoke or destroy the will at pleasure, and he may change or alter its provisions as often as he chooses, provided he has the altered instrument re-executed and re-attested according to law. Even after the testator's death the instrument has no force until duly established in a proper court, and, after probate, any beneficiary named therein may refuse to accept a legacy, or other provision made for him in the instrument, if he elects so to do. It is apparent, therefore, that the peculiar nature of a will makes inapplicable to it the rule of law heretofore referred to in regard

to deeds, or other written contracts, and that the decision in this case must rest upon other principles.

In regard to all wills the great object of the courts is to give full effect to the intention of the testator, but the will to which such effect is to be given is one made in conformity with the requirements of the statute. In the case of an interlineation, or other alteration by the testator, without a new attestation, if effect should be given to such change, the statute of wills, which requires an attestation by subscribing witnesses, would be disregarded. If, on the contrary, a will were, because of alterations, to be held entirely void, it might utterly defeat the intentions of the testator. To avoid this dilemma of disobeying the mandate of the legislature on the one hand, or of defeating the intention of the testator on the other, the courts, in case of an interlineation, erasure or other alteration, made in a will, either by the testator or a stranger, after the due execution of the instrument, disregard the change and probate the will according to its original language, when that can be ascertained. *Doane v. Hadlock*, 42 Maine, 72; *Smith v. Fenner*, 1 Gall. (U. S. C. C.) 170; *Will of Tonnele*, 5 N. Y. L. O. 254; *Pringle v. McPherson*, 2 Brevard (S. C.), 279; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557; *Wheeler v. Bent*, 7 Pick. 61; *Penniman Will Case*, 20 Minn. 245; *Wolf v. Bollinger*, 62 Ill. 368; *Locks v. James*, 11 M. & W. 901; *Short v. Smith*, 4 East, 418; *In re Hardy*, 30 L. J. Prob. 142; *Cooper v. Bockett*, 4 Moore, P. C. 419.

While in the courts of this State this precise point seems to have been very little discussed, yet there are several cases indicating the opinions of the judges upon the question. Before the revision of the statutes of this State a will of realty only passed such lands as the testator owned at the time of the execution of the will. In the case of *Jackson v. Holloway*, 7 Johns. 394, which arose while that was the law of the State, the testator had made his will devising all lands which he was possessed of to his sons, but after its execution he altered the clause so as to read "all lands which I die possessed of." This change

effected a material alteration, as the testator had bought other lands since the execution of the will. As to the effect of the alterations the court said: "The obliterations in the will were made not with the intent to destroy the devise already made, but to enlarge it, by extending it to the lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention. It is, therefore, very clear that the first devise must stand good."

There are many cases in the Surrogates' Courts in this State in which it has been held, without much discussion of the question, that wills in which unattested alterations or obliterations have been made by the testator since the execution of the instrument should be admitted to probate and recorded in their original form. *McPherson v. Clark*, 3 Bradf. 92; *Matter of Prescott*, 4 Redf. 178; *Wetmore v. Carryl*, 5 id. 544-553; *Dyer v. Erving*, 2 Dem. 160-183; *Will of Wood*, 32 St. Rep. 286. The doctrine of these cases is also held to be the law of this State in *Quinn v. Quinn*, 1 T. & C. 437. In the will there considered the testator, after its execution, had erased some legacies, and in some bequests had changed the name of the beneficiary. The General Term directed the entire will as originally executed to be admitted to probate.

In *Lovell v. Quitman*, 25 Hun, 537, affirmed in the Court of Appeals, 88 N. Y. 377, two bequests, one of \$5,000 and one of \$2,000, had been obliterated, or erased, with a pen, but were still legible. The appellants claimed that the parts of the will so obliterated were revoked, and that seems to have been the only point argued by counsel, or discussed in the opinions of the appellate courts. The surrogate, however, admitted the whole will, including the obliterated clauses, to probate, and his action in this respect was approved by the higher courts, which affirmed his decree. The text writers also hold opinions upon the point under consideration similar to those heretofore expressed.

Woerner, in his American Law of Administration, Vol. 1, page 92, says: "If a legacy be obliterated by a stranger, or inserted by interlineation, or changed in effect or amount, and the original legacy be known, it may be proved as it originally stood." In 1 Redfield on Wills, page 315, paragraph 22, it is said: "Where the testator makes an alteration in his will, by erasure or interlineation or in any other mode, without authenticating such alteration by a new attestation, in the presence of witnesses, or other form required by the statute, it being presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute, such alteration not being so made as to take effect, the will stands, in legal force, the same as it did before, so far as it is legible after the attempted alteration." In Schouler on Wills, sections 434 and 432, the rule is stated as follows: "When a will is informally altered by the testator * * * the legal effect is not to make the will void, but to establish it in probate as it stood before the change was made." "Alterations made in a will by a stranger after its due execution and without the testator's knowledge or sanction do not affect the validity of the testament in other respects." "If there is no sufficient attestation of the will as altered the alteration cannot take effect, but the will stands as before."

I conclude, therefore, that the will must be admitted to probate and recorded as it was before the alterations and obliterations before mentioned were made; and a decree may be entered in accordance with this opinion on two days' notice.

In re ZEREGA'S WILL.

(Surrogate's Court, New York County, Filed October, 1892.)

TESTATOR'S DOMICILE—WHAT CONSTITUTES.

A testator was domiciled in New York City prior to 1854, and thence till 1863 in Westchester County, where he had purchased a country

residence. In 1863 he purchased a house in New York City, where he maintained a residence for twenty-five years subsequently till his death. He lived seven months each year in the New York City house, and all the evidence showed that he exercised absolute ownership thereover, although his married daughter and her husband lived with him. In 1876, on qualifying to be an executor, he described himself as a resident of New York City, and in 1887 he wrote a recommendation for his gardener, stating that if he was ever in want of a gardener for his "country place" he would take him as such. There was no evidence that he had voted subsequently to 1863. *Held*, that his domicile was in New York County, although he had made declarations under circumstances not disclosed that he had bought the New York City house for his daughter, that he had his "home" in Westchester County, that he had paid his taxes in latter county, that he had made wills in 1872 and 1885, describing himself as of Westchester County; that he had advertised his place in latter county for sale in 1888, describing himself as having lived there from 1854, and that he had written a letter in 1888 directing certain checks to be sent to his bankers, as his residence was not in "New York, but Westchester."

Petition to revoke probate of will. Denied.

Johnson, Gallup & Hurry, for petitioners; Horace Barnard, for respondent.

RANSOM, S.—Section 2476 of the Code of Civil Procedure provides that the Surrogate's Court of each county shall have exclusive jurisdiction to take the proofs of wills, when the decedent was, at the time of his death, a resident of that county. Augustus Zerega died in the city of New York on December 23, 1888. The petition for the probate of his will, filed by his widow, recited that the testator was "late of the County of New York;" that he "was, at or immediately prior to his death, a resident of the County of New York." The paper was verified in the usual form. In January, 1889, all of the heirs and next of kin waived the service of a citation, and the execution of the will was proved by the subscribing witnesses. On February 11th it was admitted to probate, and letters testamentary were issued to the widow, her eldest daughter, and two of her sons. On April 22, 1889, six sons and a grandson of the testator and a legatee named in the will united in a petition to the surrogate,

praying that the decree of probate be revoked, alleging, upon information and belief, that the petition for probate was signed by the widow without reading it, or without a realization of the importance of its contents, and (in substance) that Mr. Barnard, the attorney, had misrepresented to her the purpose of the petition; that the testator was, at the time of his decease, not a resident of the County of New York, but was, and for a period of 35 years had been, a resident of Westchester County, where his family residence was situated; that Mr. Barnard had represented to the various heirs at the time he took the will that he would have it probated in the proper county; that they were ignorant of the law governing such proceedings, and of the proper county for such probate, and that they signed the waivers under the belief that they were in due form of law, and alleging that this court had no jurisdiction to enter the decree admitting the paper to probate. Mr. Barnard is the husband of one of the executrices, and had represented the proponent in proving the will. He put in an answering affidavit, in which he not only denied the statements of the petitioners, but alleged that the testator was and had been a resident of New York since 1863, and set forth other matters pertinent to the subject. This was followed by further affidavits made by the sons, the grandson, and others in support of their petition. After due consideration of the case on all the papers presented, I denied the petition. On appeal, the General Term, in December, 1890, decided that the decree of probate must be reversed. 12 N. Y. Supp. 497. This would seem to be final, and to have ousted this court of jurisdiction; and though the General Term, by an order entered December 29, 1890, did adjudge that the decree of probate was "in all respects reversed," it remitted the proceedings in this court "for further action," but it gave no intimation of the action to be taken. In a memorandum filed June 17, 1891, I called attention to the anomalous situation of the case, and had it placed in the calendar for a hearing on June 23rd. Subsequently, on July 8, 1891, on the consent of the respective attorneys, an order was entered directing E. F. Un-

derhill, Esq., as assistant, to take further evidence, and it is upon the record of proofs reported by him, and the previous papers and proceedings, that the matter now comes before me for decision.

The word "resident," like many others in the language, has varying shades of meaning. In its application to this proceeding it will be considered in its legal sense. In the Century Dictionary it is defined to be "a place where a man's habitation is fixed without any present intention of moving therefrom; a domicile." And "domicile," in the same work, is defined to be "a place where a person has his home, or principal home, or where he has his family residence and personal place of business; that residence from which there is no present intention of moving, or to which there is such intention to return, it depending upon the concurrence of two elements: First, residence in the place, and, second, the intention of the person to make that place his home." Judge GRIER, in *White v. Brown*, 1 Wall. Jr. 217, says: "It may be correctly said that no one word is more nearly synonymous with the word 'domicile' than the word 'home.'" These definitions reflect the consensus of opinion as expressed by the courts. Though a man may have two residences, he can have but one domicile. *Douglas v. Mayor, etc.*, 2 Duer, 110; *Bell v. Pierce*, 51 N. Y. 16. Augustus Zerega, for many years, had two residences. For some time after he came to this country his domicile of choice was the city of New York. From 1854 to 1863 his sole residence was in Westchester, and for that period, certainly, Westchester was his domicile. In 1863 he purchased a house in East Thirty-fifth street, where, for the last 25 years of his life, he maintained a residence in the city of New York. In *Dupuy v. Wurtz*, 53 N. Y. 561, the court held that, to effect a change of domicile, there must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile; that residence alone had no effect, *per se*, though it might be most important as a ground from which to infer intention; that length of residence would not alone effect a change, and

intention alone would not do it, but the two taken together constituted a change of domicile. Did Mr. Zerega, when he acquired a residence in this city, which he occupied the greater portion of each of the 25 years preceding his death, or at any time subsequently, elect to make it his domicile, and to look upon his Westchester house as a country residence? On the *ex parte* affidavits of the petitioners and others sustaining their contention, and the answering affidavit of Mr. Barnard, I held that he did. On the same evidence, the General Term decided that he did not, and that his stays in New York were only temporary. Many of the facts assumed by the appellate court as the ground for its decision have been shown by the proofs taken in this proceeding, in which there was an opportunity to cross-examine the affiants, and by other evidence, to have been largely without foundation.

To sustain their contention, the petitioners rely mainly upon the oral and the written declarations of the testator, the fact that he paid taxes on his personal property in Westchester County, and the assumption that he voted there. The oral statements extend over a period of 25 years, and for the most part are testified to by the petitioners. Their value as an aid in determining the question of domicile depends upon whether they have been accurately restated by the witnesses, and upon the credit to be given to their testimony. In this proceeding the hostility to Mr. Barnard of the petitioners who appeared as witnesses before the assistant was not disguised. The statements made in their affidavits, perhaps without due consideration, became extravagant and reckless under the cross-examination by Mr. Barnard, which was conducted in no amiable spirit, and it is apparent that at times bias and personal feeling caused them to exaggerate, if not to distort, the language of the testator. Nor can I trust the accuracy of their memories, covering a period of many years, in some instances, after the words were uttered. Still I have no doubt that the testator did, in words or in substance, after he had acquired a residence in New York, say that he "lived in Westchester;" that he had his "home" or

his "residence" there; that he had "lived there 35 years;" and that he used other similar expressions. The circumstances under and the spirit in which he made the statements are not disclosed; and if he ever spoke of being a "citizen" of Westchester, as stated by one witness, it is not shown whether it was before or after he bought the house in New York. Words are not used by laymen with the precision which lawmakers and courts aim to employ. Even in legal enactments, in which the words "resident" and "residence" are used, the courts have often been invoked to interpret their meaning as applied to particular cases. The word "domicile" (which was used in the earlier decisions in this State) has not been traced in this case to the testator's lips. If he had used it, it is doubtful whether he, a man of business, would have understood the refined distinction between it and words of similar, though not exactly the same, import. Westchester County had been his domicile, certainly, until 1863. From that time until his death it continued to be his residence for five months in the year. The words attributed to him are not inconsistent with the formation of a purpose, at some period during the 25 years preceding his death, to make New York his domicile. Akin to these statements of the testator are declarations attributed to him that he had purchased the house in Thirty-fifth street for his daughter (who was about to marry Mr. Barnard) to live in; that, as he had bought the house, he might as well have the benefit of it; that he visited his daughter in winter; that he thought it would be better to help her pay the expenses of the table, etc. The language attributed to the testator in this regard cannot be accepted as evidence of facts, and any presumption claimed to arise from it may be rebutted by trustworthy proofs that it is untrue. The circumstances under which the language was used are not shown—whether in a petulant mood, in a spirit of fault-finding, or whether it was deliberately uttered.

With written declarations the liability to a distortion of language is lessened, and if the paper is all in the handwriting of the party it is not open to suspicion. But the value of written

declarations as evidence depends upon the circumstances under which they were made—whether care was taken to have the paper read to the party, if only the signature is in his handwriting, and whether his mind grasped the legal import of the words used, if the language in the paper was not his own. In the words of Surrogate Bradford (*Isham v. Gibbons*, 1 Bradf. Sur. 91), “written declarations, even of the most solemn character, are but facts to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At best, the animus of the party is only to be inferred from them. In this respect they are taken like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention.” So, in *Attorney General v. Kent*, 1 Hurl. & C. 12, though the judges held that jurisdiction was in the English courts, they stated that the declaration in the will that the decedent was “residing in the County of Surrey” was entitled to very little consideration. And in *Gilman v. Gilman*, 52 Me. 165, it was held, though the testator described himself as “of the city and State of New York,” that the recital could not weigh against facts which led to the conclusion that his domicile continued at Waterville, in the State of Maine. In *Hegeman v. Fox*, 31 Barb. 478, referring to both oral and written declarations, the court (Judge EMOTT writing the opinion) says: “To the evidence of what he said at various times, I attach little importance. It comes to us impressed with the character of the particular mood of the man when he uttered it, which, no doubt, varied and was affected by the condition of his health, by his family circumstances, and by other causes. It is colored more or less by the medium through which it comes, and it depends altogether upon the recollection of witnesses; nor do I consider the statement in Mr. Moore’s bill in chancery that he was an inhabitant of Florida, standing alone, as at all decisive. It was necessary for him to make such an allegation for the purpose of his suit, and he might very well have made it without fully considering its im-

port or its extent or its consequences in other relations. Coupled, however, with his conduct, it is evidence which may disclose another motive for a wish, on his part, to acquire a residence in Florida, at or after the time when he settled near Jacksonville.

* * * But the whole matter is a question of intention, and no arbitrary rule is to be laid down in relation to it." And in *Dupuy v. Wurtz*, 53 N. Y. 562, it is laid down as a rule that "courts must draw their conclusions of intention to change a domicile from all the circumstances in each case."

The written declarations relied upon by the petitioners are: First. The will of 1872 (executed nine years after the testator had acquired a residence in New York), in which he declared himself as of the town and County of Westchester. The paper was drafted by Mr. Barnard, who claims that from early in December, 1863, the testator had been domiciled in the house in East Thirty-fifth street. Mr. Barnard's explanation for inserting a recital which he claims was untrue, is, "if he gave the matter any thought," that it was "to please the vanity of other members of the family, who thought themselves dignified by their father owning a country residence," though he states he had no conference with them about the will. The explanation is a suggested possibility, and is unworthy of consideration. The paper was copied by the testator, and executed, and I see nothing to discredit the recital of his place of residence in 1872 as equivalent to a domicile. Second. A paper written by testator in 1886, and delivered to Mr. Pelham Clinton, in which he sets forth the wholesomeness of his Westchester place, as evidenced by the fact that he, at 83, and his wife at 77, had lived there since 1854, with a large family of children and grandchildren, with but one death. But the avowed purpose of writing the article was for Mr. Clinton to procure its publication in the newspapers as a means of reaching a purchaser for the place. The statement was, to say the least, disingenuous, for it is shown that for 25 of the 35 years he had passed only five months in each year on his Westchester property; and, as the

paper was written in the month of November, it was probably prepared in his New York house. Third. A letter of the testator to the gas company, written in May, 1888, while he was still in his Thirty-fifth street house, directing that the checks for dividend on his stock be sent to Hallgarten & Co., who were his bankers, and "not to 26 East Thirty-fifth street," stating that his residence was "not in New York, but Westchester." The two dividends which followed—June 15th and December 15th—were sent to his bankers, as requested. A few days after the last dividend he died. The purpose of the letter is evident—to avoid the necessity of having checks remailed to him from East Thirty-fifth street to Westchester, to be then forwarded to Hallgarten & Co. The language seems to import that he had had trouble in this respect in previous years. In the statement written for Mr. Clinton he used the word "living;" in the letter to the gas company, the word "residence." He and his family had "lived," and were still living a part of the year in Westchester, and at the time he wrote to the gas company his "residence" was, and for 25 years had been, during seven months in the year, in East Thirty-fifth street. Whether that was his domicile I will consider hereafter. But in neither case were the circumstances under which the words were used such as to lead him to carefully weigh their technical significance. Fourth. The will of 1885, in the testator's handwriting, in which he again describes himself as "of the town and County of Westchester." The paper had been drafted by Mr. Barnard, he using the language of the will of 1872, except where its provisions were to be modified, and, if Mr. Barnard's testimony is to be credited, with the understanding that the testator would go over it with him before its execution. It was not done, however, and the instrument recites him as of Westchester.

In this connection I may refer to written declarations of the testator which tend to show the recognition by him of a domicile in New York. In September, 1876, he, as executor, propounded the will of his late partner, Mr. Bernier, for probate, and in the petition, duly verified, he described himself as of the city

of New York, and in qualifying as executor in December following he said: "I am a resident of No. 26 East Thirty-fifth street, in the city of New York." I see no reason for the statement in the brief and argument of the petitioner's counsel that Mr. Barnard, who was the attorney in that proceeding, had "entrapped" the testator into making these declarations, for the words filled in the blank form of deposition do not seem to be in Mr. Barnard's handwriting. They were probably inserted by a clerk of this court at the probate desk, and, as is the rule, were read by the affiant, or they were read to him before his signature was affixed. It is most improbable that a painstaking, careful and conservative business man, as this testator is shown to have been, would swear to a paper without knowing its contents, though, as I have previously stated, it may be doubted whether he considered the legal significance of the word "resident." Then, on December 12, 1887, he wrote from 26 East Thirty-fifth street a recommendation for Patrick Smith, who had been in his employment for six years, stating that if he was ever in want of a gardener on his "country place" he would take him as such. To the same effect are certain oral declarations. To Mr. McRae, who was negotiating a sale of the property, he spoke of the Westchester house as his "country seat" or "country place." To Mr. Barnard he used similar language. Even George T. Zerega, the most active petitioner in this proceeding, testifies that his father bought the New York house, and "intended to live in it." The petitioners claim as evidence of the continuance of the testator's domicile in Westchester the fact that he was assessed for and paid taxes on his personal property there. It was admitted on the trial that he did pay such taxes from 1856 to the time of his death "upon the personal property which was actually located at his country place in Westchester." With personalty at his death worth from \$350,000 to \$400,000, it was his good fortune that the authorities in Westchester laid his tax at only \$10,000, when his sole residence was in that county. If he did change his domicile to New York, he was very willing that the assessors in Westchester should still look

upon him as a resident there, rather than invite scrutiny by the New York authorities into his means, with a disclosure that would lead to a large increase of the amount of the taxes. In *Douglas v. Mayor, etc., supra*, the plaintiff was taxed for his personal property in this city, though his domicile was on Long Island, and he occupied a hired house in New York during the winter and spring months only. So in *Bell v. Pierce, supra*, the plaintiff's place of business and domicile were in Buffalo, but he was taxed on his personal property in West Seneca—his summer residence—where he and his family were at the time the taxes were laid. In each case, the party resisted the attempt to collect taxes in a place which was not his domicile, and in each the court decided against him. So in this case, the payment of taxes cannot fix the domicile of the testator in Westchester, if the facts proven point to a different conclusion.

In their affidavits the petitioners swore that they knew "of their own knowledge" that the decedent voted in the County of Westchester. The General Term seems to have laid much stress on this as a fact abundantly proven. But when the affiants were produced for cross-examination in this proceeding, their positive statements were found to be based on the merest hearsay. John A. Zerega testified that the testator told him "twenty times—yes, a hundred times—that he had voted." Another son, Alfred, stated that the testator drove with him to the polls. He thinks they started from his father's house (probably the Westchester house), the testator stating that he was going to vote for his old friend Watson for supervisor, and that at the polls he saw his father talking with others. He stated the time as the second election of President Lincoln. This would have been in 1864, and Alfred says that he himself then voted for Mr. Lincoln. The worthlessness of his testimony in respect of time is shown by the fact that the town meetings at which supervisors were elected were, by law, directed to be held between the 1st of February and the 1st of May in each year (Laws 1839, ch. 389, sec. 2), and this was the law in 1864. Alfred says that while in the carriage the testator said that he had never voted

but once, and would not vote except for Mr. Watson. There is no evidence in the case to show when Mr. Watson was a candidate for a town office. If in the spring of 1863, or antecedent thereto, it was before the removal of the family to the Thirty-fifth street house, when he was still living in his country place, and hence reflects no light on the question of a change of domicile in December, 1863, or thereafter. If in 1864, it was when he was actually living in the Thirty-fifth street house, whether in the spring or fall; and his daughter, Mrs. Barnard, testifies that he never left the city to vote in Westchester. There is no evidence suggesting that he voted for a town officer after 1864. But the decisive fact is the certificate of the town clerk of Westchester, which shows that the poll lists from 1863 to 1882 (except those of 1872 and 1877, which were not found among the papers in his office) do not contain the name of the testator. Hence, when he did vote in Westchester, if ever, it was prior to the election of November, 1863. Nor does the fact that the testator's name appears on the registry lists of 1863, 1864, 1865, 1867, 1868 and 1869 (1866 not being reported by the town clerk) raise any presumption of a purpose to vote after 1863, especially in view of his indifference to the exercise of the right of suffrage apparent from the proofs. By the act of 1865 (chapter 740), the registry lists were made up from the poll lists of the previous elections, to which no name could be added except upon the application of a person appearing before the board. It strains one credulity to believe that, year after year, a man would apply to be registered in Westchester when he had no intention of voting. I have not been able to find the statute providing for the registry of voters preceding 1865. When it is considered that the petitioners had scarce any foundation for a belief, not to say knowledge, that the testator had voted in Westchester, if the fact does not raise a suspicion of the honesty of their statements, it certainly makes them valueless as a support of their contention.

Another fact which the petitioners claim is evidence that the testator's stays in New York were annual visits, and that his

domicile continued in Westchester, is that, whereas, in their country residence, he and his wife occupied opposite ends of the table at meals, in New York Mr. and Mrs. Barnard held those positions, and the parents sat at their daughter's side. But, as they had reared a large family, and were advancing in years, it was natural that each should wish to be relieved from unnecessary cares, and, with a daughter and son-in-law a part of their family, to let them act in their stead.

The effort of the petitioners to place the testator and his family in the attitude of boarders with Mr. and Mrs. Barnard has utterly failed. The allegations in their *ex parte* affidavits that he "was in the habit of boarding in New York for a part of the year;" that "he paid a certain sum monthly for his expenses;" and (as testified by one petitioner) that he boarded with Mrs. Barnard (which Mr. and Mrs. Barnard deny), and paid an extravagant price therefor—and other similar declarations, have been disproved by the evidence. The testimony of Mrs. Barnard is that when the testator and his family moved into the Thirty-fifth street house, he directed her to take charge, enjoined her to be economical in its conduct, to bring him the bills for household expenses, which she did, and he gave her the money to pay them. This continued for two or three years, until he began to give checks to the order of Mr. Barnard, Mrs. Barnard not wishing to open a bank account. The checks were passed to Mr. Barnard's credit in the bank in which he kept an account, and from time to time, he drew his own checks to meet the expenses of the household, including the wages of the servants (except the nurse employed by Mrs. Barnard), and many other disbursements for members of the testator's family. The testator's checks, as appears from the testimony, were given by him to his wife, who passed them over to Mrs. Barnard. The account books kept of the expenses of the household were each month audited by the testator, and to each footing he added a memorandum in his own handwriting, "Entered." This fact admits of no reasonable conclusion other than that he controlled the house, paid its expenses, and that to Mr. and Mrs. Barnard

were given the cares of the housekeeping, from which he and his wife wished to be relieved; and that, for their services, the daughter and son-in-law received their sustenance as members of his family. The only foundation for the claim that the testator and his family "boarded" with Mr. and Mrs. Barnard is the language attributed to him by the petitioners. With their animus towards Mr. Barnard, the force of his words, in all probability, was exaggerated. But, admitting that they substantially reproduced his declarations, they cannot weigh against the evidence that the testator was the head of the household; that his will controlled its management; that at any moment he could have displaced Mr. and Mrs. Barnard, and he and his wife resumed the cares which they had delegated to them.

The testimony of one of the petitioners that, until the will was read, he had always supposed the Thirty-fifth street house was Mrs. Barnard's; that it was always spoken of as her house, and when he visited it, he believed it was by her invitation, and that he was her guest—is not worthy of consideration. Repute and belief cannot establish a domicile, much less pass title to real estate. As reflecting on the credence to be given to the petitioners' statements is the allegation in their *ex parte* affidavits, that during the testator's stays in New York his residence in Westchester "was in charge of six servants." One would infer from this language that six of his house servants were left in the Westchester residence, whereas, for several years after his family came to New York in November it was closed, and left closed until they came back in June. A burglary on the premises caused the testator to have a room fitted up for two farm hands to occupy at night as a precaution against further depredations.

A brief statement of the testator's career as bearing on the probabilities of his having resumed his domicile in New York may be stated. He was a foreigner by birth, and no evidence of his naturalization has been found, after careful search, in the records of the courts of this city. According to his own statement, he did vote for a candidate for mayor of New York

nearly a half century ago, when he was living at an hotel. He afterwards purchased a house on Fifth avenue, where he lived with his family until 1854, when he sold it, and purchased the property in Westchester, to which they removed. He then retired from active life, the business being carried on by his partners—Mr. Bernier and his eldest son. For several years he did not leave his country residence. With sons grown up, and the cares of a large country place, he found life less congenial than when he resided in the city, and, as early as 1860, he expressed a desire to sell the property. Each fortnight he visited the city and remained at an hotel for two or three days. In 1863 his eldest daughter had become engaged to Mr. Barnard, then a young attorney, whose sphere of professional work was to be in New York. This afforded him an opportunity to return to the city. In May of that year he negotiated the purchase of the house and furniture on East Thirty-fifth street. He brought his wife and two daughters to the city, took them through the house, and, as it pleased them, he concluded to buy it. He allotted the various apartments to the different members of the household, except the rooms which he intended for Mrs. Barnard and her husband. The negotiation and the allotment of the rooms were without the knowledge of Mr. Barnard, who, when the matter was broached to him, objected, but he at length acquiesced in the arrangement. A contract of purchase was signed, and on June 2, 1863, title was passed, and the testator took possession of the property, and left it in charge of a servant of its former owner. The marriage of his daughter took place July 30th. After several weeks passed on their wedding tour, Mr. and Mrs. Barnard went to the testator's house in Westchester, where they remained for a time. In October they came to the New York house. During the months of October and November the testator and his partner, Mr. Bernier, occasionally slept in it. He purchased additional furniture especially for his own apartments. In December he came to the house, bringing his wife, two married daughters, a son, a grandson, his wife's mother, and a retinue of servants from Westchester. He brought also

his bed and table linen and plate. He caused to be built an additional room for a man-servant. He exercised all the rights of the head of the house of which, with the most of the contents, he was the owner. He gave orders that certain parties objectionable to him be not invited to visit the house. When Mrs. Barnard was ill or absent, her sister occupied her place. This occupancy of the house by the testator and his family continued the first year from December, 1863, until May, 1864, and afterwards from November 1st to June 1st, when he and his family and servants left for Westchester. This practice continued each year until late in December, 1888, when they returned to Thirty-fifth street. On the 23rd of that month testator died. From there he was buried. A death notice, stating that as his residence, was published in the newspapers, with the knowledge of his eldest son, one of the petitioners who seek the revocation of the probate of his will in this county. From the Thirty-fifth street house the testator's second daughter was married. In it he and his wife celebrated their golden wedding. There his wife's mother died, and from that house her funeral took place. For a time after taking possession of the Thirty-fifth street house the testator had an office in New street, with his partner, Mr. Bernier. After Bernier's death, he made his headquarters in the office of Hallgarten & Co., his bankers, who fitted up a portion of it for his use. His custom was to visit it daily, and whatever business he did in the way of looking after investments was done by him there. For nearly 30 years he had been anxious to sell his Westchester property. The last year of his life he said he would never put his foot on the place again. Whether, at the beginning of his stays in the city, his intention was to abandon his domicile in Westchester, and fix it in his New York residence, may be doubtful. But there came a time, I am convinced, when it was determined upon, and it first found a fixed expression, as the evidence discloses, in 1876, in the petition for the probate of and his qualification as executor under Mr. Bernier's will, in each of which papers he describes himself as of the city of New York. On all the facts

known to Mr. Barnard at the testator's death, as they have been disclosed by the evidence, he, as the attorney of the testator during his life, and of the widow in the proceeding to prove his will, was justified in assuming that this court had jurisdiction. It is a noticeable fact that neither the widow nor the daughters of the testator joined the petitioners in this proceeding. It could not be expected of Mrs. Barnard, when the good faith of her husband had been called in question. But if the allegations of the petitioners were true, and either the ends of justice or the interests of the heirs demanded, it is probable that the widow and her daughters, Mrs. Huntington and Miss Zerega, would have made supporting affidavits. Strenuous efforts were made by one son, certainly, to get his mother to swear to an affidavit, which she refused to do, because she found its recitals were untrue; and when it was modified she still declined to affix her signature. The only certain declaration of the widow which seems to favor the petitioners' contention is in a recent letter, in which she states that Mr. Barnard "knew in his heart that he was wrong, but had not the manliness to acknowledge it." This statement, however, was made in a correspondence with the son who has been most active in prosecuting this proceeding. But the conclusion of an old lady on an issue involving a technical definition has no significance in arriving at a decision of the case. That deception was practiced upon the widow by Mr. Barnard in procuring the verification of the petition for probate I do not believe. And it is incredible that the several petitioners who seek its revocation should have been imposed upon by him when they executed waivers of the service of the citation; and when the two sons qualified as executors, after probate, they raised no objection. Their antipathy to Mr. Barnard, if it had not already existed, was aroused when he suggested that debts due by some of the sons to the testator be included in the executor's inventory of the estate. They objected, and when they found that he was not tractable, the feeling on the part of some of the heirs became bitter. This was shown in the oral examin-

tion of those produced, and that the feeling was heartily reciprocated by Mr. Barnard is manifest. One witness I do credit with a sincere purpose to tell the absolute truth without reserve. I refer to Mrs. Barnard. Her testimony shows that the motive of the petitioners in beginning the proceeding was to avoid taxation of the estate in this city. It also shows their unfilial efforts to secure the active co-operation of their mother to carry out the scheme. The result has been more than three years of litigation, in which bad blood has been engendered and expense unnecessarily incurred. I can see no motive for Mr. Barnard desiring to prove the will in this court if the domicile of the testator was in Westchester. If it was not, I can see every reason why it should be proved here, where a large portion of the estate is, and where nearly all the heirs reside. As a result of a thorough examination of the whole case, I must deny the petition to revoke probate, and I will sign a decree accordingly.

(Note.—Aff'd by Gen. Term, without opinion, 76 Hun, 611.)

(Note as to law of domicil:)

DEFINITION.—GENERAL OBSERVATION.—LEADING RULE.—
WHEN A NEW DOMICIL IS ACQUIRED.—WHEN A NEW
DOMICIL IS NOT ACQUIRED.—DEGREE OF PROOF.—DOMI-
CIL OF WARD.

DEFINITION.

Domicil is defined as "that place where a man has his true fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." (Raine's Bouvier's Law Dictionary, 600, citing 10 Mass. 188; 11 La. 175; 5 Metc. 187; 4 Barb. 505; Wall. Jr. 217; 9 Ired. 99; 1 Tex. 673; 13 Me. 255; 27 Miss. 704; 1 Bos. 673; 74 Ill. 312.)

GENERAL OBSERVATION.

There are three kinds of domicil: Domicil of origin, domicil by choice, and domicil by operation of law. (Smith v. Croom, 7 Flor. 151; Story's Con. L. 48-9.)

This note will be confined to a consideration of that subdivision of the second kind, viz., domicil by choice, which is

known as "domicil of succession," which is defined in *Smith v. Croom*, 7 Flor. 151, as "the actual residence of a man, within some particular jurisdiction, of such a character as shall, in accordance with certain well established principles of public law, give direction to the succession to his personal estate," and will also include cases where the domicil of a decedent who has resided in different counties of the State comes in question.

The leading New York case on the subject is *Dupuy v. Wurtz*, 53 N. Y. 561, in which it was held that to effect a change of domicil for the purposes of succession, there must not be only a change of residence, but an intention to abandon the former domicil and acquire another as the sole domicil. There must be both residence in the alleged adopted domicil, and intention to adopt such place of residence as the sole domicil. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two, taken together, do constitute a change of domicil—citing *Hodgson v. DeBeauchesne*, 12 Moore, P. C. Cases, 283, 328; *Munro v. Munro*, 7 Cl. & F. 877; *Collier v. Rivas*, 2 Curties, 857; *Aikman v. Aikman*, 3 McQueen, 855, 877. This rule is laid down with great clearness in the case of *Moorhouse v. Lord* (10 H. L. 283, 292) as follows: Change of residence alone, however long continued, does not effect a change of domicil as regulating the testamentary acts of the individual. It may be and is strong evidence of an intention to change the domicil. But unless in addition to residence there is an intention to change the domicil, no change of domicil is made. And in *Whicker v. Hume* (7 H. L. 139), it is said the length of time is an ingredient of domicil. It is of little value if not united to intention, and is nothing if contradicted by intention. And in *Aikman v. Aikman* (3 McQueen, 877), Lord Cranworth says, with great conciseness, that the rule of law is perfectly settled that every man's domicil of origin is presumed to continue until he has acquired another sole domicil with the intention of abandoning his domicil of origin; that this change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change.

LEADING RULE.

The leading rule is that, for the purposes of succession, every person must have a domicil somewhere, and can have but one

domicil, and that the domicil of origin is presumed to continue until a new one is acquired. (Same case, citing *Somerville v. Somerville*, 5 Ves. 750, 786, 787; *Story, Conf. Laws*, sec. 45; *Abington v. N. Bridgwater*, 23 Pick. 170; *Graham v. Public Ad.*, 4 Brad. 128; *DeBonneval v. DeBonneval*, 1 Curtis, 856; *Attorney General v. Countess of Wahlstatt*, 3 Hurl. & Colt, 374; *Aikman v. Aikman*, 3 McQueen, 855, 863, 877.)

WHEN A NEW DOMICIL IS ACQUIRED.

When a testator purchased an expensive house in New Haven, where he said he would live and die, and that he would never live in New York again except for a few days, and soon afterwards died, *held*, that his domicil was in New Haven, although he previously spent the winters in New York and the summers in New Haven, and was described in his will as of the city of New York. (*Petersen v. Chemical Bank*, 32 N. Y. 21, *aff'd* 27 How. Pr. 491.)

A testator who was in ill health left Brooklyn for Florida, stating that he could not stand the climate of the north, and that he never expected to return. *Held*, that as he had sold his house and furniture in Brooklyn, and closed up his business there, his domicil was in Florida, where he purchased a plantation, and where he died within two years subsequently, and his wife was entitled to one-third of his personal estate according to the law of Florida. (*Hegeman v. Fox*, 1 Red. 297; *aff'd* 31 Barb. 475.)

A testator was held to be domiciled in New York, although he had described himself in his will and in a trust deed as of the State of New Jersey, in which State he died, and had a residence, when he also had a residence in New York County, where he resided the greater portion of his time, and where he voted and held official positions, and that therefore a provision of his will was invalid under the laws of this State as violating the statute of perpetuities, although valid according to the laws of the State of New Jersey. (*Mackenzie v. Mackenzie*, 3 Misc. 200, 23 N. Y. Supp. 270.)

Intestate, a resident of New York City, having become mentally unsound, was removed to Oneida County in 1894, where he resided till his death in 1897, except for a short residence in Connecticut. A committee of his person and estate was appointed by the Supreme Court of Oneida County. *Held*, that decedent's residence at his death was in Oneida County, and

that the New York Surrogate's Court had no power to issue letters of administration to his estate. (Matter of Hyland, 24 Misc. 357, 53 N. Y. Supp. [87 St. Rep.] 717.)

WHEN A NEW DOMICIL IS NOT ACQUIRED.

The word "resident" in the statute authorizing the reception of a foreign probate in the case of a will made by a non-resident in this State, does not mean an actual, naked residence, but a permanent and fixed abode, and is synonymous with the words "inhabitant" and "domicil." (Isham v. Gibbons, 1 Brad. 69, in which case it appeared that testator, who had lived in and had a dwelling in New Jersey, came to New York to consult a physician, and rented a house where he died after two years' occupancy. All the evidence showed that his residence in New York was merely for the convenience of seeing his physician, and that he intended to return to New Jersey. *Held*, that his domicil was in New Jersey, and an exemplification of the probate of his will in that State should be recognized as valid here.

An intestate on her way from Scotland, her domicil of origin, to Canada West, died at Staten Island. *Held*, that as she had not lost her domicil of origin, mere intention to change not being sufficient without actual residence in the intended domicil, her estate should be distributed according to the law of Scotland. (Graham v. Public Administrator, 4 Brad. 127.)

A testator who was born in and resided in the city of New York till her marriage went with her husband to live in Philadelphia, where she resided with him for thirteen years, when they separated, the husband making his home in Philadelphia, and she, with three children, in New York, where she lived with them till a short time prior to her death, which occurred in Europe. She supported her children out of property left her, and which she bequeathed to them by her will. *Held*, that as since the passing of the Married Women's Acts the rule that a woman acquires the domicil of her husband and changes it with him, no longer prevails, and she may acquire a separate domicil of her own, the domicil of the wife was in New York City, and not Philadelphia. (Matter of Florence, 27 St. Rep. 312, 54 Hun, 328, 7 N. Y. Supp. 578.)

Declarations of a change of residence, or of intent to do so, are not sufficient to show such change: there must also be proof of facts showing an actual change. (Matter of Clarke, 40 St.

Rep. 12, in which case it was held intestate had not changed his residence from Otsego County to Herkimer County.)

In *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. Supp. (81 St. Rep.) 61, it was held that although a testator had resided for many years in different parts of Europe, he did so on account of his wife's and daughter's health, and as he had in his will and many other documents described himself as of the city of New York, and as his property was almost entirely in this country, he had never lost his domicile here, and his will should be construed according to the laws of this State.

A testator came to New York City in March, 1894. His residence had been previously at Piermont, Rockland County. He boarded in New York City till 15th of March, 1895, at the expense of his wife, who would not tolerate his intemperate habits, but who was willing again to live with him if he reformed. As he did not do so, his wife brought an action for separation in April, 1895, at which time testator went to New Jersey and thence to Rockland County, where he died in October, 1895. Although a will, not holographic, made by him in April, 1895, described him as residing in the city of New York, his attorney who drew the will was not particularly instructed to so describe him, nor was testator's attention particularly called thereto, although he compared the will with a rough draft thereof. On the other hand, two assignments of a trust fund executed by decedent at the same time, and two affidavits verified by testator, described testator as of Piermont, New York, the affidavits further alleging that Piermont was his permanent residence. *Held*, that testator's residence for the purpose of jurisdiction on his estate, was Piermont, and not New York City. (Matter of Brant, 30 Misc. 14, 62 N. Y. Supp. [96 St. Rep.] 997, citing *Dupuy v. Wurtz*, 53 N. Y. 556; *Hart v. Kip*, 148 N. Y. 306, 42 N. E. 712; *In re Stover*, 4 Red. Sur. 82, 85.)

Although testatrix lived continuously in France and Switzerland and in traveling in Europe from 1865 till her death in France in 1897, except for one year (1878-9), when she came to New York, *held*, that as she had not intentionally relinquished her residence in New York State, the court here had jurisdiction to admit her will (executed in accordance with the laws of this State) to probate, notwithstanding her lengthened residence abroad. (Matter of Cleveland, 28 Misc. 269, 59 N. Y. Supp. [93 St. Rep.] 985.)

DEGREE OF PROOF.

It was held in *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. Supp. (81 St. Rep.) 61, that a change of domicil to a foreign country should only be established by the clearest proof, especially when the property interests and the residence of the beneficiaries, etc., are in this State.

DOMICIL OF A WARD.

When a testator domiciled in Connecticut directed that his daughter should, after his death and during her minority, reside in New York under the care of her guardian there, *held*, that although the daughter, after residing for some time in New York with her guardian, died in Connecticut, where she was at school, her domicil was in New York. (*Matter of Howard*, 52 Barb. 294.)

Although a mother, after the father's death, may change her children's domicil, she loses this right when she marries again. (*Brown v. Lynch*, 2 Brad. 214.)

In re GAGAN'S WILL.

(*Surrogate's Court, Orange County, Filed June 8, 1892.*)

1. WITNESS—CODE CIV. PRO. SEC. 829.

A witness, who is an executor, is not an interested party within meaning of Code Civ. Pro. 829, in proceedings to probate a will.

2. ATTORNEY AS SUBSCRIBING WITNESS—COMPETENCY.

An attorney who draws, and is a subscribing witness to, a will, may testify as to its preparation and execution under amendment to Code Civ. Pro. sec. 836 of 1892, which was declaratory of the law as it then stood.

3. STATUTE—WHEN NOT UNCONSTITUTIONAL.

Amendment of 1892 to Code Civ. Pro. sec. 836, enabling an attorney who draws a will and is also a subscribing witness thereto, to testify as to its preparation and execution, is not, although retrospective, unconstitutional, as interfering with vested rights, as the statute under which the right, if any, was claimed was repealed by the amendment.

Probate of will of Henry Gagan, deceased. Granted.

Howard Thornton, for executors; E. A. Brewster, for contestant; J. L. Strahan, special guardian for an infant contestant.

COLEMAN, S.—The objection to the testimony of the witness Thornton is not well taken. The testimony is objected to, first, because the witness is named in the will as an executor, and, not having renounced such appointment, is an interested party, within the meaning of section 829 of the Code. *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. Rep. 874, is cited as authority in support of this claim. That case only decides that an executor who is also a legatee may release his legacy, and then be a competent witness in probate proceedings, although he has not renounced his appointment; following *In re Wilson*, 103 N. Y. 374, 8 N. E. Rep. 731, which originated in this court.

This testimony is also objected to because it discloses communications made by the deceased to the witness, who was his attorney, in the course of professional employment. Code Civil Pro. section 835. In *Re Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71, it was held that the testator waived, as he might do under section 836, the pledge of secrecy imposed by this statute at the time he requested his lawyer to become a witness to the will. The legislature, however, afterwards, in 1891, by an amendment to section 836, provided that the waiver must be made on the trial or examination. This will was executed January 29, 1892, and the testator died February 21, 1892. The proceedings for the probate of the will were commenced April 14, 1892, and the witness Thornton was examined therein May 26, 1892. The legislature, by another amendment to section 836, which took effect May 12, 1892, provided that "nothing herein contained shall be construed to disqualify an attorney, on the probate of a will heretofore executed, * * * from becoming a witness as to its preparation and execution, in case such attorney is one of the subscribing witnesses." So that the admission of the testimony of this witness was by legislative

sanction, and also, properly, independently of the statute, for I think the statute was declaratory of the law as it then stood. I am not aware that it had been so declared in the higher courts, but in this court it has been held, since the amendment of 1891, that the testator, by asking his attorney to become a witness to his will, not only waived the pledge of secrecy imposed by the statute, but thereby removed and dissolved the confidential relation of attorney and client existing between them, so far as the execution of the will was concerned. This view of the law is a fair conclusion to be drawn from the argument of the court in *Re Coleman, supra*, notwithstanding the statement there made that, except for the waiving having been made, the testimony would not have been admissible. See, also, *Rosseau v. Bleau*, 131 N. Y. 177, 183, 30 N. E. Rep. 52. If this is a correct view of the law, then it is not important whether the amendment of 1892 is unconstitutional, as urged on behalf of the contestants, because of interfering with vested rights. However, I am of the opinion that this amendment is not open to this objection. This doctrine does not apply to remedial statutes; which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights. 1 Kent Comm. 455; Potter's Dwar. St. p. 167. The right, if any, of the contestants to object to the testimony under consideration depends upon a statute, and such right was lost by the passage of the amendment, which amounted to a repeal of the statute under which they claim the right. *Miller's Case*, 1 W. Bl. 451; *Rex v. Justices of the Peace*, 3 Burr. 1456; *Muggs v. Hunt*, 4 Bing. 212, 12 Moore, 357.

Will admitted to probate.

In re FILLEY'S ESTATE.

(Surrogate's Court, Rensselaer County, Filed June, 1892.)

1. SURROGATE'S COURTS—ORDER TO SHOW CAUSE—PRACTICE.

Although section 780, Code Civil Procedure, providing for shortening the time for notice of motion to less than eight days, by an order to

show cause, is not directly made applicable to the Surrogate's Court, the practice is well settled that the Surrogate's Court may employ an order to show cause to shorten time of notice.

2. BOND OF EXECUTOR—WHEN TIME TO FILE IT MAY BE EXTENDED.

The surrogate has no authority to extend, as a matter of favor, the time of an executor to file his bond under Code Civ. Pro. sec. 2687, beyond the five days therein provided, yet he may, under Code Civ. Pro. secs. 724, 2538, relieve a party from an order taken against him when he can show it occurred through mistake, inadvertence, or excusable negligence, and the same relief may be obtained under Code Civ. Pro. sec. 2481, subd. 6, for fraud, newly discovered evidence, clerical error, or other sufficient cause.

3. SAME—NEWLY DISCOVERED EVIDENCE.

A decree having been made, under Code Civ. Pro. sec. 2687, requiring an executor to give bond within five days, it will not be reopened under Code Civ. Pro. sec. 2481, subd. 6, on the ground of the alleged newly discovered evidence that real estate which the executor on the application for the bond, alleged to be of less value than stated, and in respect of which he subsequently furnished proof that it was, upon the assumption that it belonged to testator at the time of his death, of a certain value, had been really conveyed by the decedent to the executor, who conveyed it to another, when such facts were obviously known to the executor at the time of the application.

4. SAME—EXTENT OF EXECUTOR'S LIABILITY.

The court may require a bond from an executor covering property alleged to have been fraudulently conveyed by his decedent.

5. DEED—DELIVERY.

The fact that a deed from a testator to his son, who is also his executor, is in possession of latter, is not evidence of delivery, as the executor might have come into possession of the deed in his character as executor, especially when there is an absence of any fact to support the presumption of delivery beyond the bare possession by the executor.

and there is no proof of prior negotiations upon the subject of transfer, but there is proof that he was, at his death, in possession of the property.

A decree having been made on the petition of a creditor of Marcus L. Filley, deceased, requiring the executor to give a penal bond in the sum of \$32,000 or, in default, be removed from his office, the executor, Marcus L. Filley, Jr., made a motion requiring the creditor, Horace Staples, to show cause why the penalty should not be reduced to \$8,000. Denied.

R. A. Parmenter, for executor; Henry A. King, for creditor.

LANSING, S.—The first question for examination is the objection that section 780, Code Civil Pro., which provides for shortening the time for notice of motion to less than eight days by an order to show cause, etc., is not made applicable to the Surrogate's Court; and subdivisions 4, 6, section 3347, of the Code, are cited in support of the position. I am inclined to think that section 780 is not directly made applicable to the Surrogate's Court. This section contains the general Code provisions upon the subject of time of notice of motion, and provides it shall be eight days, unless, etc. If the section is not applicable to the Surrogate's Court, then, in the absence of any other provision (and I have been able to find none), a notice of motion in this court could be made without special limit as to time of service of notice, etc. But, in the absence of such provision, perhaps subdivision 11 of section 2481 would apply, which provides, in effect, that where jurisdiction is given in any matter to the Surrogate's Court, and the practice is not prescribed, it shall proceed "according to the course and practice of a court having by common law jurisdiction of such matters." But, whatever the warrant for the practice of employing an order to show cause to shorten time of notice, the practice is well settled in Surrogate's Courts to employ it, and it has been so employed both before and since the adoption of the new Code. Redfield, in his work on Surrogate Practice (4th ed.), p. 57,

says: "The proceeding to vacate a decree under section 2481, subd. 6 [where this application is unquestionably made], is properly initiated by a notice of motion or order to show cause." See, also, *Cluff v. Tower*, 3 Dem. Sur. 253. For the purposes of this application I shall hold the practice proper.

I am satisfied that the next objection of the creditor, that the Surrogate has no authority to extend the time of the executor to file his bond beyond the five days provided in the order, is technically well founded. But, while the surrogate may not extend the five days fixed by section 2687 in which to file bond to six or ten days, he may, in a proper case, under Code, sections 724, 2538, relieve a party from an order taken against him when he can show it occurred through "mistake, inadvertence, or excusable negligence," etc.; and the same relief may be obtained in certain cases hereafter mentioned under section 2481, subd. 6, above cited. But under either section relief must be obtained, if at all, not as a matter of favor, but for the specific reasons or upon the grounds provided in the statute. This disposes of the preliminary objections, and brings us to an examination of the question whether the executor has presented a case authorizing the surrogate to open or modify the decree made herein on the 7th day of May, 1892, adjudging the executor's pecuniary circumstances to be such as not to afford adequate security for the due administration of the estate of the deceased, and requiring him to file a bond in the penal sum of \$32,000 within five days, or, in default thereof, that his letters testamentary be revoked. Section 2687 of the Code of Civil Procedure provides that if, upon the return of the citation issued under section 2686, the objections to the executor, or any of them, mentioned in section 2685, "are established to the surrogate's satisfaction, he must make a decree revoking the letters issued to the person complained of. But the surrogate may, in his discretion, * * * allow letters to remain unrevoked * * * [subdivision 3] where the case is within subdivision 5 of that section" (2685)—that is, where the executor is pecuniarily irresponsible—"if the executor gives within a reasonable time, not exceeding five days,

the bond prescribed in article first of this title." The surrogate appears to have no discretion as to time in which to file a bond in the first instance, if he finds the objection sustained.

The direction of the surrogate of the 10th of May, 1892, was a decree (section 2687, *supra*), and this decree was the deliberate and formally expressed judgment of a court having entire jurisdiction both of the person and subject-matter involved. The decree adjudged (1) that the circumstances of the executor did not afford adequate security to the creditors for the due administration of the estate; and, (2) that the value of the property belonging to the estate at the time of testator's death was \$16,000. I am satisfied that this decree must remain, unless appealed from, or unless the case can be brought within section 2481, subd. 6, of the Code, which provides that this court may open, vacate, or modify its decree or order and grant a new hearing for "fraud, newly discovered evidence, clerical error, or other sufficient cause," but with the qualification that "the powers conferred by this subdivision must be exercised only in like cases, and in the same manner, as a court of record and of general jurisdiction exercises the same powers." This application must rest upon the ground of "newly discovered evidence." The ground "other sufficient cause" will not avail to support an application for the introduction of evidence under this section, where its only claim for consideration, in the nature of things, is that it is newly discovered. Now, what are the facts appearing on this application as to the ground of newly discovered evidence? The creditor alleges in his petition the ownership of the property (the mansion house in Lansingburgh) in the testator, and its value. A postponement of several days was sought by Mr. Filley, the executor, for the purpose of submitting to the court proof in regard to the value of the same real estate (he alleging it to be of less value). Proof was subsequently furnished by the executor (without any denial of the fact, and upon the assumption that the real estate in question belonged to the testator at the time of his death) that it was of the value of \$9,000. The fact, if fact it be, that

this real estate had really been conveyed to Marcus L. Filley, executor, by his father, prior to his decease, and had been by him individually conveyed since the institution of this proceeding to the alleged grantee, Carter, was well known to Mr. Filley, and known prior to the time the decree was made, and the fact was obviously suppressed by him. Clearly it is not a case of newly discovered evidence. (1) The opening of a surrogate's decree, formally and lawfully made, requires the exercise of the soundest discretion. (2) It should only be done in extraordinary cases, and where errors are plain, palpable, and beyond any question. *Decker v. Elwood*, 3 Thomp. & C. 48; *Dedf. Law & Pr. Sur. Cts.* (4th ed.) p. 58, and cases cited. It is well settled that a motion to open an order or decree in Surrogate's Court should be entertained only on newly discovered facts, showing that it was made without jurisdiction or through inadvertence, mistake or fraud. *Janssen v. Wemple*, 3 Redf. 229. "Where a party has had his day in court, he must show that it was not his fault that he did not improve it, before he can get another day on the same matter." *In re Estate of O'Neil*, 46 Hun, 501. The discovery of further evidence in an account book, which was in possession of the party pending the litigation, prior to the decree, cannot be deemed newly discovered evidence upon which the decree should be opened. *Olmsted v. Long*, 4 Dem. Sur. 44. See, also, *In re Kranz*, 41 Hun, 465; *In re Tilden*, 98 N. Y. 434; *In re Hawley*, 100 N. Y. 206, 3 N. E. Rep. 68. I am satisfied from an examination of the authorities that the surrogate is utterly without power to vacate or modify the decree made herein. Orders and decrees in Surrogates' Courts are placed upon precisely the same footing as those in other courts of record, and the power conferred to open or modify "must be exercised only in like cases as a court of record and of general jurisdiction exercises the same power." It will hardly be claimed that the facts appearing upon this application would warrant the granting of a new trial in the Supreme Court, on the ground of newly discovered evidence. There is, therefore, no ground stated in the moving papers which

would warrant a new hearing, or authorize a modification of the order or decree granted in this matter, and I can conceive of none which could be added from the facts disclosed. The executor well knew the fact, the introduction of which he now seeks as a ground for the modification of the decree, before the application was made. Indeed, I am sure he has not been surprised or misled, for it was stated upon the hearing that the bond in the amount directed would have been given if the executor had been able to do so. These views lead to a denial of the motion for a new hearing or for a modification of the bond.

Two other questions involving the merits were discussed upon the motion, which, in the view I have taken, are not necessarily involved in the decision of this motion, yet, as the result of my examination of these questions tends to support the conclusion I have reached upon the more technical ground, it may not be improper to discuss them briefly.

First. As to the question of requiring a bond covering property alleged to be fraudulently conveyed. I am satisfied that while the decision in *Peck v. Peck*, 3 Dem. Sur. 548, holding "that the Surrogate's Court, in fixing the bond of the executor, should not take into consideration any property of the title to which the testator or intestate had divested himself during his lifetime, whether a transfer was procured by fraud or otherwise," states the general rule, yet there is no such hard and fast rule upon the subject, since in some cases the main object in taking out letters is for the purpose of recovering property fraudulently conveyed. Laws 1858, ch. 314, sec. 1, as amended, Laws 1889, ch. 487. "And [it is held] in any case an executor is chargeable with breach of trust for neglect in instituting any action or proceeding necessary to recover assets fraudulently disposed of by his decedent." *In re Cornell*, 110 N. Y. 351, 18 N. E. Rep. 142; *Hangen v. Hachemeister*, 114 N. Y. 566, 21 N. E. Rep. 1046. In such cases, at least, bonds should be required covering the amount of probable recovery, and the statute seems to contemplate the exaction of the same by the proper court.

Second. Upon the remaining question, whether the said real estate belonged to testator at his decease, it would seem, under the authorities (aside from all considerations pointing to a fraudulent conveyance), that the proof offered comes far short of showing a transfer of the legal title from the testator before his death. The deeds in question are not recorded. A deed, to convey title, must not only be duly executed, but must be delivered. The fact that the deed from the father, the testator, to the son, is in the possession of the son, who is his executor, does not furnish the necessary proof that it was delivered to the son as grantee during the lifetime of his father, because, if not delivered, he, as executor, would be likely to come into possession of it. In fine, therefore, the absence of any proof of prior negotiations upon the subject of transfer, and the absence of any fact to support the presumption of delivery beyond the bare possession of the deed by the executor after death of testator, with the added fact that M. L. Filley, Sr., was at the time of his decease in possession of the property, would seem to require something further to establish that said instrument was delivered by the grantor with intent to convey title prior to his death. *Knolls v. Barnhart*, 71 N. Y. 474; *Gifford v. Corrigan*, 105 N. Y. 223, 226, 11 N. E. Rep. 498.

But, as I have before stated, a decision of the two questions last above discussed are not necessarily involved in the decision of this motion, since I am compelled to hold, under the authorities, that the presentation of the deeds upon this application cannot in any just sense be termed "newly discovered "evidence," so that no ground appears which will warrant the opening or modification of the decree. Motion to vacate or modify the decree of May 10, 1892, denied, with \$10 costs of motion, and, upon filing proof that the executor failed to file his bond as required by said decree, a decree may be entered vacating the letters testamentary heretofore issued to said executor.

In re JACKSON'S WILL.

(Surrogate's Court, Orange County, Filed June 1, 1892.)

1. LEGACY—UNCERTAINTY.

A legacy of \$1,000 to Thaddeus J. Boyd provided he will in the future write his name T. Jackson Boyd, "but if he refuses so to do I only give him \$500, and the balance, \$500, to revert back to my residuary estate," is not void for uncertainty, but is valid, and is vested, subject to be defeated by a breach of the condition.

2. SAME—CLAUSE OF FORFEITURE.

A condition in a will that "Should any person or society be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld," is so broad and sweeping that it could not be enforced, for it could not be ascertained whether it has been violated, and a legatee who files objections to probate of the will, for insufficiency of execution, and also as to the validity of a number of its provisions, does not thereby forfeit his legacy.

3. SAME—BEQUEST FOR PIOUS AND CHARITABLE PURPOSES—UNCERTAINTY OF BENEFICIARIES.

A bequest of residuary real and personal estate to executors, "to be expended by them for benevolent and charitable purposes, as they, or the survivor of them, shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world," is void, there being no certain designated beneficiary.

Probate of will of Theodore L. Jackson, deceased. Granted.

J. M. Wilkin, for executors; Greene & Bedell, for Theodore L. Boyd, contestant; G. O. Hulse, special guardian.

COLEMAN, S.—The contest in this matter has finally narrowed down to three questions: First, the validity of the legacy of Thaddeus J. Boyd; second, whether the opposition to the probate of the will, made by Theodore L. Boyd, invalidated the legacy given him by the will; third, as to the validity of the forty-ninth, or residuary, clause of the will.

With reference to the first of these questions, the language of

the will is: "I give and bequeath to Thaddeus J. Boyd the sum of one thousand dollars, provided he will write his name in all future time, T. Jackson Boyd; but if he refuses so to do, then I only give him five hundred dollars, and the balance, or \$500, to revert back to my residuary estate." It is alleged that the gift is void for uncertainty; that the condition imposed by the testator is dependent upon the whim or caprice of the beneficiary, and cannot, therefore, be ascertained or judicially determined. It is my opinion, however, that the gift is valid, and is vested, subject to be defeated by a breach of the condition, which is a condition subsequent, and one which may be fully complied with. There was some evidence upon the hearing that the legatee has, so far, complied with this condition. The executors should ascertain, however, before paying over the legacy, that the legatee has met the requirements imposed by the testator. *Dustan v. Dustan*, 1 Paige, 509. In the event of a subsequent breach, the parties next entitled have their action to recover. *Davies v. Lowndes*, 2 Scott, 71; *Taylor v. Mason*, 3 Wheat. 325; *Luscombe v. Yates*, 5 Barn. & Ald. 544; *Tilden v. Tilden*, 13 Gray, 103.

And as to the second, the testator's will contains the following: "Should any person or society be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld." Theodore L. Boyd, who is given a legacy of \$200, has filed objections to the probate of the will as a whole, for insufficiency of execution, and also as to the validity of a number of its provisions, particularly of the residuary clause, and a contested probate has been had by reason of such objections. The language of the will relating to this subject is so indefinite and uncertain that the testator's intention cannot, with any certainty, be ascertained. Apparently any dissatisfaction as to any gift therein made is sufficient to debar a legatee from taking a legacy. A condition so broad and sweeping, if intended, could not be enforced, for it could not be ascertained whether it has been violated. I am of opinion that the contestant has not

forfeited his legacy. *Jackson v. Westerfield*, 61 How. Pr. 399 (407), and cases cited.

Third. After making some forty-odd items in his will, the testator finally provides as follows: "All the rest, residue, and remainder of my property and estate, of every name and nature whatsoever, and wheresoever situate and placed, I give to my executors, to be expended by them for benevolent and charitable purposes, as they or the survivor of them shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world." This is clearly void, there being no certain designated beneficiary, and as to such residue the testator died intestate. *Tilden v. Green* (N. Y. App.), 28 N. E. Rep. 880.

Will admitted to probate, except the residuary clause.

LANG v. HOWELL.

(Surrogate's Court, Westchester County, Filed January, 1892.)

EXECUTOR—WHEN LEGATEE OVERPAID.

On the judicial settlement of his accounts, an executor cannot obtain a decree directing a residuary legatee to whom the executor has knowingly paid the entire residue, to refund the amount of his expenses, and a debt due him, and his commissions, and costs of accounting, but must seek for relief elsewhere.

Judicial settlement of accounts of William Lang, as executor of Eliza Stringer, deceased.

Arthur T. Hoffman, for executor; H. T. Dykman, for Cecilia A. Howell, a legatee, and others.

COFFIN, S.—The portion of the will supposed to be especially bearing upon the question as to what the decree should provide, under the circumstances, appears to be as follows: "All the

remainder of my possessions I give to my nearest relative, Cecilia A. Howell; at her death the property to be divided equally between her three daughters." The rule, as I understand it, is that, where the gift to the first taker is absolute in its terms, the gift will be deemed an absolute one, and a gift over would be void for repugnancy. 2 Jarm. Wills, 53; Bell v. Warn, 4 Hun, 406; 2 Washb. Real Prop. ch. 7, sec. 5, subd. 11; Merrill v. Emery, 10 Pick. 507, 512. However this may be, as there was no trust created by the will, and no debts, as alleged, Mrs. Howell could receive the legacy, even if it were for life only; and it was in the discretion of the executor, and for his protection, to exact from her a proper receipt or security. The surrogate has no authority to require from a life tenant security for the remaindermen after the legacy has been paid, even if he can before. See *In re Shipman* (Sup.) 6 N. Y. Supp. 276. That may be done by some court of general jurisdiction on the application of a remainderman, where the circumstances seem to require it. *Id.*; Fernbacher v. Fernbacher, 4 Dem. Sur. 227, and cases cited; Redf. Pr. (4th ed.) 597, and cases cited. But the disposal of the case does not wholly depend upon the determination of these questions. The executor, Lang, seems to have had the sole management of the estate. He, in his account of proceedings filed, charges himself with the whole amount of the inventory, and then proceeds to credit himself, in detail, with the legacies paid; such legacies exactly amounting to the sum of the inventory. The daughters of Mrs. Howell were of full age, had been cited, and made no objection to the credit claimed for the legacy he had paid to their mother. He states in schedule A "that all the property of Eliza Stringer was given or devised as hereinafter stated," and then says: "There were no debts, except the money due from the savings banks, stated in said inventory, which were delivered to the legatee, Cecilia A. Howell, by me." Then, in schedule B, he states that "all the articles mentioned in said inventory were delivered to the legatees" (among which were the bank pass books), of which he received in value \$265.45, and his daughter

§40. Besides this, the executor was, by the will, made devisee of a part of the real estate for the term of five years. The value of the personal estate so delivered to Mrs. Howell as legatee appears to have been about \$6,200. She was undoubtedly right in receiving it, and, as it was paid to her by him with, of course, a full knowledge of his actual or pretended claim against the deceased, this court has no power to compel her to refund any part of it in order to satisfy his claim, his commissions, costs, and expenses of the accounting or the like. Such relief as he claims must be sought in some other forum. It would be an unprecedented proceeding, where the executor had paid out all of the assets to the legatees, to decree that they should refund sufficient to pay his commissions and expenses of accounting; and equally so to satisfy any other claim of his. *Adair v. Brimmer*, 74 N. Y. 539-558; *In re Underhill* (Surr.), 9 N. Y. Supp. 457, affirmed by the General Term of second department, 6 N. Y. Supp. 133, and by the Court of Appeals in 117 N. Y. 471, 22 N. E. Rep. 1120. In the last case the court says: "When it is determined that an overpayment has been made by the executor, in legal contemplation, the excess is in his hands." Although executrix, Mrs. Howell's position as legatee is the same as that of any other legatee, and the effort of the executor is, in effect, to recover back a part of the legacy he claims to have paid her in excess of what he should have paid. For this purpose he must resort to some other forum, as already stated. The decree should direct that the executor should be awarded the several sums as fixed and claimed by him, to be paid, however, out of any assets remaining in his hands, or that may hereafter be received by him.

In re BEACH'S ESTATE.
(1 Misc. Rep. 27.)

(Surrogate's Court, Cattaraugus County, Filed September, 1892.)

1. WILL—WHETHER LIFE ESTATE OR GIFT ABSOLUTE INTENDED.

Testator gave and bequeathed to his wife "all of my personal property that I shall be possessed of at the time of my death, and all of my household goods, and the use of my real estate during her natural life. * * * (2) To my daughter M. the organ that is now at my house; after the death of my wife, I give (3) to my son B. the sum of \$500; (4) to my son W. the sum of \$500." *Held*, that the widow took but a life estate in the personal property, excluding the organ.

2. WILL—IRRECONCILABLE PROVISIONS.

As in such will the gifts of the personal estate to the wife and the organ to the daughter were irreconcilable, the daughter took the organ immediately and absolutely.

3. WILL—CONSTRUCTION.

The words "after the death of my wife" should be read in connection with each of the following bequests, and therefore the two \$500 legacies became payable after the death of the widow.

4. ALLOWANCE FOR MONUMENT.

As the estate amounted to \$8,000, the rights of creditors were not interfered with, the executor had consulted with several of the legatees, and no one objected to the expenditure but the widow, and the monument was nearly ready for delivery, *held*, that although the cost of the monument (\$400) reached a limit held to be unreasonable, it would be allowed to the executor under the circumstances.

5. WITNESS—WHEN COMPETENT UNDER CODE CIV. PRO. SEC. 829.

Although an executor is not a competent witness in the first instance, to testify to transactions between himself and his decedent as to a partial payment upon a joint note of decedent and the executor, yet, having been examined, and contestant having proved by him sufficient to establish his individual liability, *held*, that the executor might testify as to the entire transaction so as to relieve himself of such liability.

6. EXECUTOR'S ACCOUNTS—JOINT NOTE OF DECEDENT AND EXECUTOR.

Decedent's estate is liable for the balance due on such a note, when it appeared the decedent gave the proceeds to the executor, his son, to

buy a team, and intended to pay it himself, and that money paid and indorsed on the note was furnished by decedent.

7. SAME—EMPLOYMENT OF CLERK BY EXECUTOR.

If an executor employs another to transact for him the usual and ordinary duties of his trust, the expense of such cannot be charged to the estate.

8. SAME—EXECUTOR'S LIABILITY FOR LOSS ON RESALE.

An executor is liable for loss on a resale of personal property, when, although the purchaser obtained the goods, he did not pay cash, or give a note as required by the terms of sale, and was allowed by the executor, who took a mortgage on the articles sold, to secure a debt due to himself, to retain possession of the property for seven months.

Judicial settlement of account of executor of Isaac H. Beach, deceased.

A. & G. E. Spring, for executor; William H. Ticknor, for contestant.

DAVIE, S.—This is a proceeding for the judicial settlement of the accounts of the executor of the will of Isaac H. Beach, who died April 23, 1891, leaving him surviving his widow and six children, and real estate of the value of \$6,000, and personal property to the amount of about \$2,000. Such settlement necessitates a construction of certain portions of the will, and the widow files objections to various items of the account. The will is very inartistically drawn, and it is no easy task to determine the actual intent of the testator therefrom. The disposing portion of said will is in the following form:

“First, after all my lawful debts are paid and discharged, I give and bequeath to my wife, Hannah M. Beach, all of my personal property that I shall be possessed of at the time of my death, and all of my household goods, and the use of my real estate during her natural life. But I will that she shall keep the buildings on said real estate in good repair, and pay all taxes on the same. (2) To my daughter Mabel L. Beach, the organ that is now at my house, after the death of my wife, I give. (3) To my son Benjamin C. Beach, the sum of \$500.

(4) To my son Willey E. Beach the sum of \$500. (5) The balance of all my property, of every kind, name and nature, I will shall be equally divided, to share and share alike, between all of my six children, namely, Benjamin C. Beach, Willey E. Beach, Rosetta E. Ryder, Clara E. Cagwin, Ella L. Vedder, Mabel L. Beach."

The questions raised are: First, does the widow take the personal estate absolutely, or simply a life estate therein? and, second, when are the two \$500 legacies payable?

Various rules of construction have been formulated, but the chief solicitude of courts, in construing wills, is to ascertain the actual intent of the testator, and carry the same into effect as far as possible. The testator in this case was worth about \$1,000 at the time of his marriage with the contestant. They lived together as husband and wife for many years, and the balance of his estate was accumulated by their joint industry and frugality. Contestant is now 57 years of age. Hence it would seem that the testator would very naturally desire, in the first place, to make some certain and ample provision for the maintenance of his wife during the time she might survive him, but to do so in such a manner as not to jeopardize the rights of his children. How could such a result be better accomplished than by giving the wife the use of the entire estate during her life, with provisions for its equitable distribution among his children after her death? The evidence shows that the annual rental value of the real estate is \$350. The income from the personal estate would increase this amount somewhat. This would seem to be a very moderate provision for the maintenance of the widow. Such a disposition of the personal estate, however, would seem to meet the approval of a careful, prudent man, like testator, rather than an absolute gift of the same to her, thereby endangering the rights of the children through the possible improvidence or lack of prudence incident to the advanced age of the widow. Whether the provisions of this will are susceptible of the construction suggested depends entirely upon the use made of the term "during her natural

life"—whether such term is held to relate to the entire preceding sentence, or simply to the single clause, "and the use of my real estate." Had the words "the use of" been omitted from such clause, the ordinary interpretation of the entire sentence would make the words of limitation "during her natural life" applicable to the entire bequest. *Areson v. Areson*, 3 Denio, 458; *Van Allen v. Mooers*, 5 Barb. 110; *Carpenter v. Carpenter*, 2 Dem. Sur. 534. It is urged on the part of the contestant that the words "the use of," coupled with the disposition of the real estate and not with that of the personal property, indicates a design on the part of the testator to convey a greater estate in the latter than in the former; that, had he intended to limit the bequest of the personal property in the same manner as the real estate, he would have used the same words of limitation, "the use of," in both instances; that this difference in phraseology takes the case out of the operation of the rule of interpretation above cited. While fully recognizing the force of this suggestion, yet, in view of all the attendant circumstances, the extent of the estate, the habits and mode of life of the contestant, and the character of the other bequests in said will, I am of the opinion, and must hold, that it was the intention of the testator to give to the widow simply a life interest in said personal estate.

The next question relates to the bequest of the organ to the daughter Mabel. The preceding portions of the will dispose, in terms, "of all the personal property and household furniture." This would, of course, carry the organ, were it not for the subsequent specific bequest thereof to the daughter. The two provisions of the will are absolutely irreconcilable, so far as the disposition of the organ is concerned. This being the case, the latter provision must prevail. *Van Nostrand v. Moore*, 52 N. Y. 12; *Chrystie v. Phyfe*, 19 N. Y. 345. Consequently the daughter takes the organ absolutely, and is entitled to the immediate possession thereof.

The conclusion already arrived at necessarily determines the remaining question, as to the time of payment of the two \$500

legacies. The time of payment is dependent entirely upon the use made of the expression, "after the death of my wife." It is urged on part of these legatees that this clause should be read in connection with the bequest of the organ, but I cannot adopt such view, but must hold that such clause is to be read in connection with, and as a part of, each of the following bequests. There is nothing in the will or surrounding circumstances indicating an intent on testator's part to make these legacies immediately payable out of the real estate; and, having given the widow the use of the personal estate during her lifetime, it could not be available for payment of legacies or distribution until the termination of her life estate. In my judgment the only reasonable construction which can be given to this will is to hold that the widow takes a life estate in all the personal property, except the organ; that the organ passes to the daughter absolutely; that upon the death of the widow the two \$500 legacies become payable, and the residuum subject to distribution.

The account filed shows that the executor has entered into an agreement, in writing, for the expenditure of \$400 for a monument to be placed at the grave of the testator. The widow objects to this expenditure as unreasonable and excessive. Of course, no arbitrary rule has been or can be laid down, establishing the question of reasonableness of funeral expenses. Each case must be determined from its own particular circumstances. A reasonable expenditure for a tombstone is regarded as a legitimate item of funeral expenses to be allowed to the executor upon his accounting. *Ferrin v. Myrick*, 41 N. Y. 315; *Tickel v. Quinn*, 1 Dem. Sur. 425. So the only question in this case is whether the sum named was reasonable or not. In one case it was held that an expenditure of \$500 for such purpose, where the estate did not exceed \$8,000, was unreasonable, and was not allowed against the heirs. *Owens v. Bloomer*, 14 Hun, 296. In case of an estate of \$2,600, it was held that an expenditure of \$250 was not unreasonable. *In re Erlacher*, 3 Redf. Sur. 8. In case of an estate of \$1,200, that \$150 was a

reasonable expenditure. *Emans v. Hickman*, 12 Hun, 425. While the expenditure made by the executor in this case would seem to reach the limit, yet, in consideration of the fact that the estate amounts to \$8,000; that the rights of creditors are not impaired by the expenditure; that the executor consulted with several of the legatees before making the contract, and no objection is made to such expenditure by any one but the widow; that the executor, as such, evidently in good faith, has contracted for the monument; that the monument itself has been prepared, and is now nearly ready for delivery—I am unable to see how the interests of this estate are to be subserved by holding that this expenditure was unwarranted. *In re Laird*, 42 Hun, 136.

Contestant also objects to the payment of a certain note by the executor to one D. P. Howes, to the amount of \$152.65, upon the grounds: First, that the right of action thereon against the testator was barred by the statute of limitations before his death; and, second, that the debt for which said note was originally given was that of the executor himself. The contestant called and examined the executor as a witness, and established the fact by him that such note was originally given for his individual benefit, and that the indorsements thereon were for moneys which he had himself paid. The note itself bears date August 3, 1881, and the last indorsement thereon is of the date of March 28, 1890; so that, if said note was not outlawed, it is in consequence of the partial payments made thereon. This state of facts, unexplained, would show such payment by the executor to have been unauthorized. A partial payment by one of the makers of this note, without the consent or authority of the other, would not prevent the statute running against the one not paying. Now, the executor would not have been a competent witness, in the first instance, to testify to the transaction which took place between himself and deceased regarding such payment, or the original inception of the note (section 829, Code Civil Pro.); but the contestant, having examined the executor as a witness, and proved by him a sufficient portion of said transactions to establish his individual liability,

removed such disability, permitting him to testify to the entire transaction for the purpose of relieving himself of such disability. (*Nay v. Curley*, 113 N. Y. 575, 21 N. E. Rep. 698; *Davis v. Gallagher*, 55 Hun, 593, 9 N. Y. Supp. 11). The further examination of the executor shows, not only that the money paid and indorsed on the note was furnished by the testator with the express instruction that it should be so used, but also that, in the making of the note, originally, testator gave the proceeds thereof to the executor to aid him in buying a team; that testator in fact gave the note to the son, and designed to pay the same himself. These facts justify the payment of the note out of the estate.

Contestant also objects to the payment of the item of \$24 to Mr. Whiting. A portion of this sum is a proper charge against the estate. The appraiser's fees for two days at \$3 per day is a proper and reasonable charge. The witness fees of Mr. Whiting and wife, from their residence to Franklinville, to attend the probate of the will of deceased, amount to \$3.76, which is also a proper charge. The balance of said item appears to be for services purely clerical in their character, and such as the executor could and should have performed himself. If the executor saw fit to employ another to transact for him the usual and ordinary duties of his trust, and for which the commissions were designed as full compensation, the expense of procuring such services becomes his own debt, and cannot be charged to the estate. *Hall v. Campbell*, 1 Dem. Sur. 415; *In re Carman*, 3 Redf. Sur. 46; *Ward v. Ford*, 4 Redf. Sur. 34.

The remaining question arises out of the following facts: On the 10th day of December, 1891, the executor sold certain personal property belonging to the estate at public auction. The terms of the sale were cash, or good, indorsed paper running 10 months. At the sale certain property was sold to one Robinson; among other things, one horse, for \$41, and one mowing machine, for \$28. The executor himself bid off one spring wagon for \$38, and on the same day sold it to Robinson. On the day after the sale, the executor prepared a note for the

amount of Robinson's purchase, and requested him to sign it, and furnish an indorser. Robinson did not do so. A short time thereafter the executor again presented the note to Robinson, who then refused to furnish an indorser. At the same time Robinson was indebted to the executor personally, to the amount of \$125; and on December 23, 1891, the executor took a chattel mortgage upon this property, which Robinson had so purchased, to secure his own individual debt. After Robinson had refused to give the indorsed note the executor sold his mortgage and claim thereby secured to one Dake. Nothing further appears to have been done in this matter until the executor was cited to show cause why he should not judicially settle his accounts. Thereupon the executor procured Dake to satisfy said mortgage, and to take another upon Robinson's crops, and thereupon took the property back from Robinson, made another public auction, and sold the horse thereat for \$25, the mowing machine for \$12, and the spring wagon for \$28.35, or \$41.65 less than the same property sold for at the first sale; and contestant urges that the executor should be charged with the deficiency. If the executor, immediately upon the refusal of Robinson to give the indorsed note, had reclaimed and resold the property, he could not have been subject to the imputation of bad faith, nor held accountable for any deficiency. But permitting said property to remain in Robinson's possession until the month of June, 1892; allowing him to use the same, thereby diminishing its value; knowing all the time that Robinson was irresponsible, yet holding a chattel mortgage upon this identical property to secure his own debt; doing nothing to enforce collection of the claim, or to recover said property—presents an entirely different phase. An executor is bound to exercise active diligence in the management of the estate, and if loss occurs through his negligence, he becomes personally liable as for a *devastavit*. *Harrington v. Keteltas*, 92 N. Y. 40; *Hasbrouck v. Hasbrouck*, 27 N. Y. 182. In this case the executor should account for the entire amount said property sold for at

the first sale. The account filed should be modified in the particulars suggested, and a decree entered judicially settling the same as so modified.

In re LENT'S ESTATE.
(1 Misc. 264.)

(Surrogate's Court, Rockland County, Filed November, 1892.)

ADMINISTRATOR—JUDICIAL SETTLEMENT—JOINT DEPOSITS.

When it appeared that although an intestate had two deposits in banks in his own name, the same represented the earnings of decedent and of his brother, the administrator, and as the evidence disclosed that they both worked for about the same period of time at the same wages, *held*, that the administrator having drawn the entire moneys, was liable to account for one-half thereof, and also *held*, that as to a third deposit in the joint names of intestate and the administrator, as it appeared that this sum also represented the joint earnings of the brothers, the administrator should likewise charge himself with one moiety thereof.

Judicial settlement of administrator's accounts.

Irving Brown, for administrator; William McCauley, Jr., for contestant.

WEIANT, S.—Daniel Lent, the intestate, died October 16, 1890. William H. Lent was appointed administrator of his estate on December 20 of the same year. The administrator, in this proceeding, now renders his account, wherein he charges himself with assets consisting of one-half the principal and interest of a bond and mortgage aggregating \$222.50, and credits himself with payments therefrom amounting to \$212; thus leaving a balance in his hands of \$10.50. The contestant interposed objections by which he alleges that assets have come into the hands of the administrator, for which he has failed to account, and with which he should be charged. The evidence discloses

that the intestate, about August 3, 1870, opened an account with the Peekskill Savings Bank, in his individual name, which was continued during his lifetime, and at the time of his death closed, with a balance appearing to be due him from the bank of about \$2,800. On January 7, 1891, the administrator collected all of this money from the said savings bank, aggregating \$2,821.55, and on the same day opened an account in his individual name in the same bank, and deposited a like sum of \$2,821.55 to his credit. On August 5, 1887, the intestate deposited in his individual name, in the Westchester County National Bank, the single sum of \$800. The credit remained there at the time of his death, and the same was paid to the administrator, upon his check drawn as such, on January 7, 1891. On the next day the said sum of \$800 was placed for safe-keeping in the hands of Walter T. Searing, secretary of the Tompkins Cove Lime Company, by which company the administrator was employed. On or about May 20, 1890, an account was opened with the said Peekskill Savings Bank, by the intestate, in the name of "Daniel and Wm. H. Lent," and which was continued down to the time of his death. On January 7, 1891, the whole of this account was withdrawn by the administrator, being the sum of \$709.62, and on the same day he deposited that exact sum to his individual account in the same bank.

The contestant claims, under the proofs adduced, that the administrator should be charged with each of these several amounts of \$2,281.55 and \$800, and one-half of the \$709.62. My opinion is that he should be charged with one-half of each sum. The \$2,821.55 is made up of a series of deposits covering the period from August 3, 1870, to January 1, 1891, ranging from \$50 to \$300 each, and the accumulations of interest thereon. The fact that the account was in the individual name of the intestate makes the claim upon the bank, presumptively, an asset of his estate. It is the rule that a bank, by receiving a deposit, becomes a mere debtor to the depositor. *People v. Mechanics' Sav. Inst.*, 92 N. Y. 7; *Whitlock v. Bank*, 36 Hun,

460. The deposit, when made, becomes the property of the corporation. The depositor is a creditor for the amount of the deposit, which the corporation becomes liable to pay, according to the terms of the contract under which it is made. *Id.* Here, then, was a debt, as appears from the account in the bank book, due to the intestate from the bank, and upon the discharge thereof, by payment of the amount of the same to this administrator, the proceeds became *prima facie* assets in his hands to full amount, and for which he is accountable as such. But there is evidence submitted that impresses me that the moneys deposited to this account, and which raised this indebtedness from the bank, were not wholly those of the intestate. It appears that this intestate and this administrator were brothers, aged, respectively, when the former died, about 60 and 58 years; that they had always remained unmarried; that they had always lived, had their home, and worked, together. A sister kept house for them. They had borne the home expenses together, and their earnings, I am authorized to infer, were kept together. The evidence of Mr. Scaring shows that they worked for the Tompkins Cove Lime Company for thirty years or more; that they were both blacksmiths, and performed the same kind of work and received the same wages; that each worked about the same time, with the exception of a period of about three months in the early part of the year 1890, when the intestate was ill. Their habits, expenses, and mode of life were about the same. They were both of the same mind in that respect, and economical and industrious. Whichever found it convenient to collect their wages, did so for both. The lime company kept but one account against them, and that was in the name of Daniel, the intestate. They collected their wages weekly, semi-monthly, or monthly, according as the company paid, on its pay day. It also appears that soon after the savings bank account was opened, in 1870, the intestate signed an order in the back part of his bank book containing such account, whereby he requested the bank to pay William H. Lent, this administrator, "the whole or any part of the money due, or which may be

due, me from said bank," etc. It is fair to infer that he did this because his brother had a like interest as himself in the account. The evidence shows that the intestate could write, that this administrator could not, and that the testator was the one who transacted all business in which both were interested. From these facts, and all the circumstances, I am led to believe that these two brothers accumulated their net earnings, placed them together, and deposited the same in this bank, to the credit of the intestate, in about equal amounts, and that, notwithstanding that the account was in the name of the deceased brother, the moneys so deposited were equally those of the administrator, and that while the debt of the bank for the same was, upon face thereof, one to Daniel, yet, in reality and truth, it was one in which William had an equal interest. The testimony of Mrs. Osborne, a sister, and of William H. James, a neighbor, is corroborative of this view. It appears, also, that these brothers acquired and held other property jointly, and through their joint earnings. It is therefore my judgment that the administrator should be charged with but one-half of the sum collected on that account. What has been said touching this sum of \$2,821.55 is alike applicable to the deposit of \$800 in the Westchester County National Bank. It represented, I am led to believe, an accumulation, also, of the earnings of the two brothers, in which each had an equal interest, and that but one-half of the sum paid to the administrator by that bank should be charged to him on this accounting.

We come now to a consideration of the account which stood in the joint names of the brothers. The funds deposited to the credit of this account were also the earnings of both. Indeed, the account was opened by a deposit of \$400 on May 20, 1890; being the same day that the individual account of Daniel shows that a like sum was drawn therefrom. This also adds another circumstance to those above advanced, showing that both brothers were interested in the moneys deposited to the individual account of Daniel. The account being in this instance in the name of both, upon its face the legal conclusion is

that it created a debt in which each was equally interested, and the facts and circumstances, and the presumed legal liability, are thus in accord. But it may be suggested that here was a joint tenancy, and the principle of survivorship applies, which exists in the case of a joint tenancy in lands. 2 Kent, Comm. 350. This form of tenancy is not favored. The common-law rule was reversed by statute as to lands (1 Rev. St. p. 727, sec. 44; 1 Willard, Real Est. 177 *et seq.*), and the courts have applied the same rule as to personalty. The unities requisite to constitute that estate are lacking. The deposits represented the separate earnings of each. Each contributed to the fund, and, as between themselves, their interests therein were several, and not joint. That doctrine, however, does not apply to a mixture or confusion of goods. Where the mixture is by mutual consent, the proprietors have a joint interest in proportion to their respective shares, and in case of a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. 2 Kent, Comm. 364; *Nowlen v. Colt*, 6 Hill, 461. But this is not even a case of the intermixture or confusion of moneys; for, as we have seen from the authorities above cited, the moneys, when deposited, became the property of the bank. The liability of the bank was one of debt, and, as to this account, a joint liability to the two brothers. The principle seems to be settled that the right of action on an obligation to two joint obligees, or on a promise for payment of a sum of money to two joint promisees, vests on the death of one in the survivor. But the right of the deceased obligee or promisee is not extinguished by his death. The survivor will hold the security and the proceeds, as trustee, to the extent of the interest of the deceased joint obligee or promisee in the debt or fund. *Mulcahey v. Bank*, 89 N. Y. 438. Their interests, as between themselves, were several, not joint. *Id.*; *Gaffney v. Administrator*, 4 Dem. Sur. 223. Where money was deposited in a bank in the names of a man and his wife, of which money the husband was the

sole owner, upon the husband's death the fund belongs to his beneficiaries, notwithstanding the form and mode of the deposit. *Wortman v. Robinson*, 44 Hun, 358. The administrator must so adjust his accounts as to charge himself with one-half of these several sums of \$2,821.55, \$800, and \$709.62, and the accumulations of interest thereon, and account for and distribute the same as a part of the estate of the intestate. Let a decree be entered accordingly; costs to both parties to be paid out of the estate.

In re LOWMAN'S ESTATE.

(Surrogate's Court, Chemung County, Filed July, 1892.)

1. WILL—UNDUE INFLUENCE—DRUGS.

In a proceeding to set aside a decree, admitting a will to probate, on the ground of undue influence, contestant insisted that from the fact of the administration of morphine to decedent by his nephew, a physician, to alleviate the pain of inflammatory rheumatism, decedent's mind had become so impaired that it could be more easily controlled, and that the nephew had administered the drug for the purpose of unduly influencing decedent in the making of his will, *held*, that as it appeared that decedent was a man of robust frame, strong constitution, temperate in habit and of splendid business attainments, and of perfectly sound mind, and that he had not taken any great portion of morphine up to the time of the execution of the will, and such as he had taken was properly administered for the sole purpose of alleviating extreme pain, no such inference could be drawn from the evidence as alleged by contestant.

2. SAME—EVIDENCE—BURDEN OF PROOF.

It was further insisted by contestants that for a long time prior to the execution of the will, testator's nephew, the physician, had charge of the business affairs of decedent, who deferred to his nephew's opinion and judgment in the management of some of his affairs, and that there was therefore an opportunity for the nephew to unduly influence decedent in the making of his will. *Held*, that undue influence is a

fact which must be proven; it cannot be guessed at. The burden of proving that fact was upon the contestants, and unless they established to the satisfaction of the court not only that the opportunity existed, but that it was followed by coercion or fraud, they could not sustain their position. That as there was no evidence that the nephew or any other person than decedent's legal adviser talked with decedent about the making of any will, or the disposition of his property, either prior to or at the execution of his will; that the witnesses to the will positively testified that decedent did not appear to be under the influence of any person, that the disposition of decedent's property was dictated by the excellent judgment which had characterized all the acts of his life, and that there was no evidence that decedent was unduly influenced by any one between the time of the execution of his will and of his death, the will in all respects conformed to the requirements of law.

3. SAME—COSTS.

When the evidence shows that a proceeding to revoke probate of a will was not brought in good faith, the contestants should be subjected to costs.

Application to set aside decree admitting will to probate.

Robertson, Smith & Bull, for contestants; Baldwin & Baldwin, for proponents.

TAYLOR, S.—On the 9th day of April, 1891, Jacob Lowman, a descendant of one of the oldest families of this county, and a resident of it all his life, at the age of 71 years, died at his home in the town of Chemung. Previous to his death, and on the 20th day of June, 1889, he had made and executed a last will and testament which was presented to the surrogate of this county for probate, and admitted to probate on the 19th day of November, 1891. On the 11th day of March, 1892, Lyman Lowman, a nephew of said deceased, and Phebe Goodwin, a niece, filed a petition in this court for the revocation of the decree admitting said will to probate, alleging that, at the time of its execution, the deceased was not competent to make a will, and that the same was procured by fraud, imposition, coercion and undue influence practiced and exercised upon the said

Jacob Lowman by certain legatees and devisees named in said instrument, and by persons at their instance, and under and by their direction and connivance; and that said deceased was under the restraint and duress of the said legatees and devisees. A citation was issued upon such petition, returnable May 2, 1892, and issue was joined upon the allegations therein contained, and a large volume of evidence taken in reference thereto. I have carefully read over the large mass of testimony taken in this case, a very considerable portion of which, bearing upon the testamentary capacity of the deceased, is of no value in view of the admission of the contestants' counsel that he had such capacity, except as it might bear upon the question of undue influence. Jacob Lowman was a man of robust frame, strong constitution, temperate in habit, economical in expenditure, a shrewd and calculating man, and of splendid business attainments. For years he had been prominent and well known in the business circles of this county, extensively engaged in lumbering, milling, farming, and the production of butter, until, at the time of his death, he was reputed to be, and probably was, one of the largest owners of real estate in the county; a man of wealth and influence. All of his life, up until within two weeks of his death, he gave personal supervision and attention to the management and control of his vast business interests. It is no extravagance of language to assert that down to the hour of his death any person who would have insinuated that Jacob Lowman was of unsound mind or incapable to conduct and manage his affairs, would have been regarded as either indulging in wit or sarcasm. He had never married, and at the time of his death he left no nearer relatives than nephews and nieces. It is not contended upon the part of the contestants but what the will admitted to probate, and which this proceeding is brought to revoke, was drawn and executed in conformity with the statutes. It appears from the evidence that some time previous to its execution the deceased sent for his lawyer, Mr. John A. Reynolds, who went to his home in the town of Che-

mung, and there, for nearly half a day, the deceased and his attorney consulted and advised over the disposition of his property. Voluminous memoranda were taken by the attorney, and following the instructions there received, he subsequently drew the will in question, leaving, however, the question of who should be executors, and one or two minor details, to be considered and settled when it should be submitted to the deceased for his signature. On the 20th of June, 1889, Mr. Reynolds, in company with Mr. Stanchfield, his law partner, went to the home of the deceased with the will, which he had drawn pursuant to the instructions he had theretofore received from the deceased. It was read over to the deceased; the executors were selected; witnesses were called in and requested to and did sign it, and it was left with Mr. Reynolds for safe-keeping. There is no pretense upon the part of these contestants that any informality sufficient to be worthy of criticism accompanied the execution of this will, but they insist that this instrument does not represent the free and voluntary act of the decedent, but is impregnated with the influences which had heretofore surrounded him and been exercised over him by some of the legatees or devisees under this instrument. The only question, therefore, that it is necessary to discuss is whether there is evidence sufficient in this case to uphold the contention of the contestants that the decree admitting this will to probate should be revoked.

The law is well settled that, in order to avoid a will upon the ground of undue influence, the influence must be such as to overpower and subject the will of the testator, thus producing a disposition of the property the testator would not have made if left freely to act his own pleasure; and this must be proved like any other fact; it must not be guessed at. The influence or importunity must be such as to deprive the testator at the time of the free exercise of his will, whereby the instrument becomes the will of another man, rather than that of the testator. Such undue influence must have been exercised in respect to the very act, and the act must be proved, and will not be in-

ferred from opportunity and interest. *Gardiner v. Gardiner*, 34 N. Y. 155; *Seguine v. Seguine*, 4 Abb. Dec. 191; *Kinne v. Johnson*, 60 Barb. 69; *Cudney v. Cudney*, 68 N. Y. 148; *Deas v. Wandell*, 3 Thomp. & C. 128. The influence exerted must appear to have amounted to moral coercion, which restrained independent action, destroyed free agency, or have been such an importunity as the testator was unable to resist, and which constrained him to do that which was against his free will. *Society v. Loveridge*, 70 N. Y. 387; *Merrill v. Rolston*, 5 Redf. Sur. 220.

Keeping in view the principles laid down by the courts for the determination of questions of fact arising in contests of this character as above cited, a brief resume of the evidence of the contestants bearing upon this question is necessary for its determination. The deceased, about six months before the time of the execution of this will, had been attacked with inflammatory rheumatism, which the evidence discloses was principally confined to his lower limbs; and which, to a greater or less extent, deprived him of that activity of body which he had heretofore uniformly possessed. At times the disease was so violent that it confined him to his house, and subjected him to severe physical pain and suffering. The physicians who attended him previous and subsequent to the execution of this will were all produced and sworn in this proceeding. They uniformly testify that they saw no evidences of mental unsoundness; that, so far as their observation and knowledge extends, with the exception of this physical incapacity, he was in the full possession of the same strength of character and mental attainments that they had heretofore noticed and observed in him. It appears from their evidence, and from the evidence of some of the attendants who took care of the deceased while suffering from this malady, that for the purpose of alleviating the pain which he endured, medicines were administered to him, consisting sometimes of morphine; and that this medicine was prescribed and furnished by Dr. Everett, who is a physician, a nephew of the decedent, and one of the residuary legatees and executors under this will.

It does not appear, however, anywhere in this case, that at the time of the delivery to Mr. Reynolds of the memoranda from which this will was drafted, or at the time of its execution by the deceased, that he was in any way under the influence of any narcotic; but, on the contrary, was in full possession of all of his mental faculties; as clear, concise, and explicit in his conversation and deportment as he had been at any time of his life. The contestants insist that from this fact of the administering of this drug the mind of the deceased had become impaired to such an extent that it could be influenced and controlled more readily, more easily, and more surely than though it had not been prescribed; and they ask us to infer that it was administered under the directions of Dr. Everett for the purpose of bringing about this condition of mind in the decedent which would enable him more readily to influence him in the disposition of his property and the making of his will. We do not think any such inference could be drawn from the evidence, if such an inference were justifiable under the law; for it is perfectly clear to our mind, after reading and considering this evidence, that the deceased had not taken any very great portion of morphine up to the time of the execution of this will; and such as he had taken was properly administered for the sole purpose of alleviating and allaying the extreme pain which he suffered from the malady above referred to. And while it is not material to a decision of this case, we think justice to the parties requires us to say that this theory advanced by the contestants is wholly without foundation, and that no person connected with or attending the decedent during all of the time of that painful illness which eventually ended his life, administered to him any medicines except in the utmost good faith, and founded upon the belief that they were the proper remedies to administer in connection with his complaint.

It is insisted, however, by the contestants, that for a time previous to the execution of this will—what length of time, how-

ever, is not clearly developed—Dr. Everett had charge of some of the business affairs of the deceased. That the deceased consulted him, and deferred to his opinion and judgment in the management of some of his affairs, is very clear. As has been stated, the decedent's business was not only extensive, but diversified. Dr. Everett was apparently one in whose judgment the deceased had some degree of confidence. He was engaged in the drug business in the city of Elmira, running and operating a store; and the deceased frequently visited him, and frequently consulted him, and often left to his management and decision some of his matters of business; and from these facts the contestants' counsel contend that there was an opportunity for Dr. Everett to exercise upon the mind of the deceased undue influence in the making of this will. But, as we have seen, undue influence is a fact which must be proven; it cannot be guessed at. The burden of proving that fact is upon the contestants, and unless they have established to the satisfaction of this court not only that the opportunity existed, but that it was followed with coercion or fraud, they cannot sustain their position. It is important, as bearing upon this question, to again recur to the time of the execution of this will. Not a scintilla of evidence has been produced that previous to its execution did Dr. Everett or any other person except the deceased's legal adviser ever even talk with him about the making of any will or the disposition of his property. At the time of the giving of the instructions to his legal adviser, none of the beneficiaries under this instrument, whom it is sought to charge with improper or undue influence, were present. At the time it was signed and executed, no one participated in that transaction except the decedent's legal adviser and the persons who were requested to sign it as witnesses; and the persons present at its execution, and who signed it at the request of the deceased as witnesses, have, in the most positive and emphatic terms, testified that the deceased appeared to be, and they believed he was, not under any restraint or influence whatever from any person.

How, then, it can be seriously contended that, in the entire absence of any proof, the deceased up to the time of the execution of this solemn instrument had been even approached upon the subject of the disposition of his property, that he was not a free agent and acting as his own conscience and judgment dictated to him, is almost beyond the bounds of comprehension or belief. The largest portion of the testimony offered by the contestants in this case as bearing upon the question of undue influence related to circumstances and incidents subsequent to the execution of this will, and running down to the time of the death of the testator. We have carefully read and considered it all, and fail to find from it a single fact or circumstance which would justify even the inference that the deceased was under the control or constraint of any human being at the time he executed this will. In fact we are constrained to say from this evidence that this proceeding is wholly without merit, and can only be accounted for upon the ground that the custom has become quite prevalent that, so soon as a man dies, leaving a large estate, it is the signal for legal controversy, oftentimes brought for no other purpose and with no other object in view than to harass and annoy the beneficiaries under a will, so that a settlement might be accomplished. It is proceedings of this character which, to a large extent, have created the public opinion that the administration of justice can be trifled with, and estates frittered away, under the withering process of litigation. Our final conclusion, therefore, is that Jacob Lowman, at the time of his decease, was fully competent in all respects to make a will. That he was in the full possession of his mental faculties, and not under the restraint, influence, or coercion of any person whatever, and the disposition of his property was in accordance with his wishes and desires, and dictated by that excellent judgment which had characterized all the acts of his life; that the will in all respects conforms to the requirements of the law, and the decree heretofore made admitting it to probate

must stand, and this proceeding must fail. We have only to add that from the evidence we conclude that this proceeding was not brought in good faith, but for some ulterior purpose, and therefore the contestants should be subjected to the costs of this controversy. An order will therefore be entered dismissing these proceedings, with costs against the contestants.

In re O'CONNELL'S ESTATE.

(Surrogate's Court, Essex County, Filed November, 1892.)

DEBTS—WHEN POLICY MONEYS APPLICABLE IN PAYMENT.

A universal devisee and legatee under a will, who after the resignation of the executor, became administrator with the will annexed, cannot, until decedent's debts are paid, retain the proceeds of a fire policy upon a house and barn upon the real estate devised to him, on the ground that on the renewal of such policy held by decedent he had instructed the insurance agent to have such proceeds made payable to himself personally, and not to decedent's estate. Such proceeds could only belong to him when decedent's debts and legacies were paid.

Petition by A. S. Prime, a creditor of decedent, for an order that petitioner's claim be paid by the administrator with the will annexed, out of moneys of the estate alleged to have been received by him.

F. A. Smith, for petitioner; P. C. McRory, for administrator c. t. a.

McLAUGHLIN, S.—Michael O'Connell died in 1884, leaving a last will and testament, by which he devised, subject to the payment of his debts and the payment of certain legacies, all his real and personal estate to his only son, Michael, the contestant, and the present administrator with the will annexed. At the time of O'Connell's death he was possessed of real estate of the

value of \$1,350, and also personal property of the value of about \$316. The will was admitted to probate, and letters testamentary thereon issued, on the 15th day of January, 1887, to the executor named in said will, one William J. Harrington, who qualified and continued to act as executor until September, 23, 1889, when a judicial accounting was had in this court, and a decree entered. This decree shows that the total amount of personal estate which had come to the hands of the executor was \$316.38, and the total expenses of administration \$395.73, and that valid claims against the estate had been presented and allowed, amounting in the aggregate to nearly \$900, and among the other claims presented and allowed was the claim of the petitioner. On the 23rd day of January, 1890, the petitioner commenced proceedings in this court for the disposition of the real estate of said deceased for the payment of debts, and thereafter said proceeding was prosecuted to a sale, and all of the real estate of said deceased, on the 26th day of December, 1890, sold, and the proceeds realized therefrom applied towards the payment of debts; not enough, however, being realized to pay the debts in full. After making such application, there remained due the petitioner upon his own claim and claims which had been theretofore duly assigned to him, the sum of \$244.91, and no question is made upon this proceeding but that the claim of the petitioner is a valid claim against the estate, and that there is due him the sum of \$244.91. On March 23, 1890, and while the proceeding above mentioned was pending for the sale of the real estate, Harrington resigned as such executor, and the present administrator, on the same day, upon his own application, was appointed administrator with the will annexed. At the time of the death of the deceased he held a policy of fire insurance upon the house and barn which stood upon the real estate above mentioned, which policy of insurance was thereafter, and while Harrington was executor, twice renewed, or new policies issued. The last policy so issued expired April 20, 1889, and on that day, at the request and on the application

of the contestant, a new policy of insurance was issued by the Aetna Fire Insurance Company upon the house and barn, the loss, if any, being made payable to the "estate of Michael O'Connell, deceased." On the 30th day of January, 1890, the house and barn mentioned in the policy were destroyed by fire, and thereafter the contestant, as the "administrator of the estate of Michael O'Connell, deceased," made proofs of loss, and verified the same by his affidavit, in which he stated, among other things, that the property destroyed belonged to the "estate of M. O'Connell, deceased," and immediately thereafter, and on the 6th of March, 1890, the insurance company paid to the contestant, "as the administrator of M. O'Connell, deceased," the sum of \$700, in full for such loss, and the said Michael, as the administrator of the estate of his father, gave to said insurance company his written receipt therefor. It is conceded that the property destroyed belonged to the estate of Michael O'Connell, deceased, and that any loss occurring thereunder was, by the terms of the policy, made payable to said estate. It is also conceded that the contestant, as the administrator of the said estate, made proofs of loss, received the insurance money, and receipted for the same as such, and that he has never accounted for this money, or any part of it. The claim of the contestant is that the money received from the insurance company does not belong to the estate of Michael O'Connell, deceased, but that it belongs to him personally, because, when the policy was issued, he instructed the insurance agent who wrote the policy to make the loss, if any, payable to him; and that he personally paid the premium on the policy, and supposed the policy was so issued, until after the loss occurred; that it was made payable to the estate by the mistake of the agent who wrote the policy. The only question, therefore, presented upon this application is whether the money received from the insurance company is part of the assets of the estate of Michael O'Connell, deceased, and to be administered as such by the administrator, or whether it belongs personally to the contestant.

Conceding the contention of the contestant, viz., that he gave directions to the insurance agent to issue the policy to him personally, and that the same was made payable to the estate only by a mistake of the agent who wrote the policy; or, conceding that the policy had been issued just as contestant claims it should have been—I am of the opinion that this money would, in that event, belong to the estate, and should be applied towards the payment of the debts of the deceased. The contestant could have no interest in the property covered by the policy, except by virtue of his father's will. The only right or interest he had, or could have, was by virtue of that paper. The will directs that the property of the intestate shall be first used to pay his debts and certain legacies, then the remainder, if anything, to belong to the contestant. So that the contestant could have no interest in any of the property as against creditors until their claims had been paid; and, while he might assume or attempt to act so as to protect only his own personal interest in the property devised, yet whatever pecuniary benefit was derived from the property for such acts of his must be held to be for the benefit of creditors until their claims had been satisfied. To hold otherwise would be to defeat the intention of the intestate as expressed in the will. When the contestant assumed to act—assumed to claim an interest in the property, even an insurable interest—he could only do so by first protecting creditors, managing the property as a trustee, as it were, for their benefit. He held all of the property in trust for the benefit of creditors and legatees until the debts and legacies were fully paid. It is true, he was not obliged to pay his father's debts; he was not obliged to pay the legacies mentioned in the will; he was not obliged to do any act in reference to carrying out the intention of his father as manifested in the will; but when he once assumed to act, which he did, according to his own contention, by attempting to insure his personal interest in the property devised, then that moment there was a legal obligation on his part to so use and protect the property devised that it should

first pay the debts of the deceased. But the contention of contestant that the policy was made payable to the estate by a mistake is not supported by the evidence in the case; on the contrary, the evidence clearly shows that when the policy was issued it was contestant's intention to protect the interest of the estate, and not solely his personal interest. The policy itself is made payable to the estate. The proofs of loss, which were made out and verified by the contestant himself, state that the property belonged to the estate. He receipted for the money as administrator, and every act which he took in relation to the insurance or the collection of the insurance money would seem to indicate clearly his intention in that respect as above expressed. I am of the opinion, therefore, that the money received from the insurance company belongs to the estate of Michael O'Connell, deceased, and that the application of the petitioner should be granted, with \$35 costs, and witnesses' fees, and \$15 fees of stenographer, to be paid out of the estate; and an order may be entered to that effect.

In re SMITH'S ESTATE.

(Surrogate's Court, Rockland County, Filed December, 1892.)

1 WILL—WHEN WIDOW ENTITLED TO DOWER IN ADDITION TO DEVISE.

A testator directed that "all rents and interest moneys be paid by his executors to his wife," out of which she should pay all taxes and assessments, the balance, or so much thereof as might be necessary for the purpose, to be used by her in support of herself and family, and after bequeathing his household furniture to his wife, he devised and bequeathed the residue of his estate to his children to be paid to them, in equal shares, as they arrived at the age of 21. *Held*, that as dower is favored, and there were no express words, or a demonstration upon the face of the will of the intention of the testator, that the widow should not take both dower and the provision made for her, the widow was entitled to dower, in addition to what was given to her by the will.

2. EXECUTOR—SALE FOR HIS PERSONAL BENEFIT.

In such case the executor sold certain lots to persons who did not complete their purchases, as the same were bought in behalf of the executor, his sister or the widow. The nominal purchasers assigned their bids without consideration to the sister, who, after receiving a conveyance thereof from the executor, conveyed same at the executor's request to the widow. *Held*, that although no person acting in a fiduciary capacity can deal with the trust estate to his personal gain or benefit, yet as the sale was not unqualifiedly repudiated by the contestant, the executor would be held to the sale; but even though the right of repudiation existed, *quaere* whether the court, under the circumstances, could afford practical relief.

3. EXECUTOR'S ACCOUNT—CREDIT FOR WIDOW'S DOWER.

On such sale to the widow, the executor cannot be allowed the value of the widow's dower in a payment to the widow, as the sale made by him must be presumed to have been made subject to the right of dower, and, if not, the executor was not authorized to purchase her dower, and, on the other hand, if she had no dower, the payment was without consideration.

4. SAME—REPAIRS TO PRESERVE REAL PROPERTY.

An executor has the right to make repairs to preserve the property and to obtain a proper income therefrom, and proof must be given that such expenditure was not necessary, before the item will be disallowed.

5. SAME—TAXES—WHEN PAYMENT ALLOWED OUT OF PRINCIPAL.

As the will expressly provided that the widow should pay taxes out of income, such payments are not chargeable against the principal estate unless it appeared there was insufficient income for the purpose, and that such payments became necessary for the preservation of the estate.

6. SAME—FIRE INSURANCE.

As the executor was clothed with trust authority over the estate, items for insurance are proper credits when, although not expressly, they were impliedly, authorized by the will, and the payments were necessary to the preservation of the property.

7. SAME—WHEN COSTS OF REPAIRS WILL BE DISALLOWED.

In the absence of explanation, an item for repairs to property paid two years after its sale, will not be allowed.

8. SAME—ITEM PERSONAL TO EXECUTOR.

A credit will not be allowed for the amount of a judgment against the executor's brother, when it has no connection with the administra-

tion of the estate, and the proof shows that it is a personal matter between the executor and his brother.

8. SAME—EXPENSE OF RESALE.

Items for expenses in making a resale of real estate will be allowed, when the resale was directed by the court, and the sums were necessarily incurred to carry out such direction.

10. SAME—LEGAL SERVICES—WHEN NOT CHARGEABLE TO ESTATE.

Legal services rendered to the widow cannot be charged to the estate.

11. SAME—GOODS FURNISHED TO WIDOW OR LEGATEE.

Goods furnished by the executor to the widow cannot be allowed against the principal. Same, if chargeable, can be only treated as a payment on account of income to her, and when the proof is insufficient to establish such, or that value in kind supplied a legatee was a payment on account of the legacy, the credits cannot stand. and the executor must seek redress in some other court.

12. SAME—PAYMENT OF INTEREST ON EXECUTOR'S MORTGAGE.

Payment of interest on a mortgage which was the individual obligation of the executor, given by him upon a lot of the estate after he became the purchaser thereof from his brother, and which accrued between the first sale thereof and a resale ordered by the court, will not be allowed.

13. SAME—PLAINTIFF'S COSTS OF SUITS AGAINST EXECUTOR.

Credit for costs paid in two suits brought in the Supreme Court against the executor will be allowed when the judgment rolls show a recovery against the executor as such, and not against him personally.

14. SAME—COSTS OF DEFENDING SUITS AGAINST EXECUTOR.

An executor does not become entitled to reimbursement for sums expended for legal services by showing the fact of payment, or that he acted in good faith. Upon objection made, he must prove the necessity and value of such services.

Judicial settlement of executor's account.

Arthur S. Tompkins, for executor; George A. Wyse, for executrix; Abram A. Demarest, for contestants.

WEIANT, S.—The testator, John T. Smith, died, leaving a last will and testament, which was admitted to probate December

20, 1875, containing the following dispositions of his property: First. He directed his funeral expenses to be paid. Second. He provides that "it is my wish, and I hereby order and direct, that my homestead farm remain in charge of my executors, to be controlled, worked, and conducted by them as they deem proper until my youngest child shall arrive at the age of twenty-one years." Third. He gives to two of his sons, Benjamin and John H., the use of certain store property for three years after his death, without rent, and then adds, "and, should they choose to occupy said premises after three years, I then order and direct that they pay such rent as shall be agreed upon between my said executors." Fourth. He directs that the moneys arising from a specified mortgage held by him "be deposited with the National Trust Company of the city of New York, at interest, in the name of my executors, after paying thereout" a certain note. "Sixth. I hereby order and direct that all rents and interest moneys be paid over by my executors to my beloved wife, Anna Maria Smith, out of which she is hereby directed to pay all taxes and assessments to be assessed against my property, the balance, or so much thereof as may be necessary for the purpose, to be used by her in support of herself and family." By the seventh item he gives a legacy of \$100 to his son Joseph, and, by the tenth, a legacy of \$500 to his daughter Deborah, which legacies he directs to be paid as soon as practicable or convenient after his decease. By the eighth provision he provides: "I give and bequeath unto my beloved wife, Anna Maria Smith, all my household furniture, of whatever name or nature whatsoever." Ninth. He bequeaths the one-half of certain store goods to his son John, and affirms a transfer which he had theretofore made to his son Benjamin of the other half thereof, and subject to the payment of certain debts. By the eleventh provision he disposes of the residue of his estate as follows: "All the rest, residue, and remainder of my estate, both real and personal, I hereby give, devise, and bequeath unto my children, except Joseph (for whom I have made ample pro-

vision heretofore), to be equally divided between them, share and share alike, and to be paid to them as they respectively arrive at the age of twenty-one years, as near as the amount thereof can be ascertained." He then adds a provision disposing of shares of such residue in the event of any of his children dying before receiving his or her share, with and without issue. Last. He appoints his said widow executrix, and his sons John H. and Benjamin executors, of his will. All qualified and entered upon the duties of the executorship, and acted therein until about in the year 1885. At that time a judicial accounting was had by the executrix and executors, and a balance of cash was then decreed to be in their hands, of \$441.21, and leaving still unadministered and undivided, of said estate, the property and assets now brought into this accounting. Immediately after such accounting, Benjamin resigned as executor. The widow remained executrix, but did not participate in the further administration of the estate. John H. continued, and practically became the sole executor of the will. Among other properties left unadministered and undisposed of at the time of the prior accounting were some lots known as the "Nyack Lots." These were sold by the accounting executor at public sale, and he charges himself with having received therefor the aggregate sum of \$4,715. Of these lots, five were struck off at such sale at certain sums, aggregating \$2,255. The persons to whom the lots were struck off never completed their purchases; and, indeed, it appears that the same were being bought in behalf of the executor, his sister, or the widow. Subsequently a conveyance was executed by the executor to his sister Catherine, to whom the nominal purchasers assigned their bids without consideration, and thereafter the sister conveyed the same, at the request of the executor, to the widow, for the expressed consideration of \$3,133.20. This consideration was made up of a valuation of the lots subject to the dower of the widow at \$2,000, and her dower estate, which at the time was computed and valued at \$1,133.20, making

\$3,133.20. The contestants claim that this sale should be held invalid, and the property decreed to be still part of the estate, or that, in the event that the same should be permitted to stand, that the executor should not be allowed the credit he has given himself in his account for the dower of the widow, of \$1,133.20.

It is well settled that no person acting in a fiduciary capacity can deal with the trust estate, to his personal gain or benefit. But, as contestants' counsel does not take the unqualified position of repudiation of the sale, I shall not consider the matter in that view. Even though such right of repudiation exists, I am not convinced that the Surrogate's Court, under the circumstances, can afford practical relief. Holding the executor to the sale, the question is then presented by the objection of the contestant as to the allowance of the credit of the \$1,133.20 for the dower. This presents the inquiry as to whether or not the widow had a dower estate in the lots conveyed to her, and involves a construction of the testator's will. The counsel for the contestants claims that the provision made by the will for the widow was such that she was put to her election whether she would take the same or claim her dower. This question has received my careful consideration, and I have arrived at the conclusion that such is not the case. If lands be devised to a woman, or pecuniary or other provision be made for her by will, in lieu of dower, she shall make her election whether she will take the lands so devised, or the provisions so made, or whether she will be endowed of the lands of her husband. 1 Rev. Stat. p. 741, section 13. When entitled to an election she shall be deemed to have elected to take the devise or pecuniary provision unless, within one year after the death of the husband, she shall enter upon the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof. Id. section 14. Many years have passed since the death of the testator, and the widow has made no entry upon the lands to be assigned to her for her dower, or commenced proceedings for the recovery of the same. If, then, such provisions of the will

for her were in lieu of dower, she must be deemed to have elected to take the same. Was such provision made in lieu of dower and she put to her election? I think not. There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or necessary implication. Where there are no express words, as in this case, there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions, and disturb the scheme of the testator, as manifested by his will. *Konvalinka v. Schlegel*, 104 N. Y. 125-129, 9 N. E. Rep. 868. Judge ANDREWS, writing the opinion in the case cited, says:

"We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower, and a claim to the benefit given by the will"—citing many authorities.

It is claimed that under this will there is a trust created in the executors, to hold the estate, and apply the income, and with a power of sale, under such circumstances that the claim of dower is inconsistent with the provisions of the testator's will, and thus she was put to her election; and the contestant's counsel cites *Savage v. Burnham*, 17 N. Y. 561, and *Tobias v. Ketchum*, 32 N. Y. 319, to sustain this proposition. But Judge ANDREWS, in *Konvalinka v. Schlegel*, page 130, 104 N. Y., and page 869, 9 N. E. Rep., thus speaks of such a contention:

"It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property, created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. The

mere creation of a trust for the sale of real property, and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee. * * * It has frequently been declared that powers of, or in trust for, sale, are not inconsistent with the widow's right of dower"—citing authorities.

The learned judge also shows that the cases of *Savage v. Burnham* and *Tobias v. Ketchum*, *supra*, have been misapprehended. So that, if there be a trust in the executors under this will to receive the rents and profits of the realty, and pay them over to the widow, and to receive and invest the proceeds of the sale, or any part of the estate, it is not necessarily inconsistent with the widow's dower in such property. The testator, by his will, in the absence of provisions to the contrary, must be presumed to be making disposition only of his own estate and interests, and subject to the interests of all others therein, including the widow's right of dower. Judge ANDREWS so holds in *Konvalinka v. Schlegel*, *supra*, and reviews the authorities establishing that principle; and, in speaking of the case of *Tobias v. Ketchum*, he says the widow was there "put to her election, not because the vesting of the title in the trustees was *per se* inconsistent with a claim of dower, but for the reason that the will made a disposition of the income, and contained other provisions which would, in part, be defeated if dower would be, or was, insisted upon." In the case of *Akin v. Kellogg*, 119 N. Y. 441, 23 N. E. Rep. 1046, the will contained an express provision that the bequests and devises to the widow were in lieu of dower. In *Re Zahrt*, 94 N. Y. 605, it was held that the provision was inconsistent with the assertion of a dower right, and so must be construed as in lieu of dower. The will in that case, after directing the payment of debts, funeral and testamentary expenses, read as follows: "I give,

bequeath, and devise to my wife, Eliza Zahrt, the rents, income, interest, use, and occupancy of all my real and personal estate"—upon certain express conditions. It was held that these conditions would be defeated as to so much of the estate as should be set off for dower, and that the disposition made by the will was so repugnant to the claim of dower that they could not stand together. Here no such conditions are attached. The widow, it is true, is directed to pay all taxes and assessments that may be assessed against the property out of the rents and interest, but I do not perceive that this is inconsistent with her estate of dower.

It may be said that the provision of the will directing that the homestead farm remain in charge of the executors, to be controlled, worked and conducted by them, is repugnant to the estate of dower therein, for the same could not be carried out if the widow be entitled to have a third thereof assigned to her as her dower. But as stated by Judge ANDREWS in *Konvalinka v. Schlegel, supra*, the testator must be presumed to be making disposition of his property only and subject to the dower. As we have seen from the authorities, the fact alone that a power of sale is given, and with a trust, is not sufficient to put the widow to her election; and I do not understand that the fact alone, in addition that she is given, either directly or through trustees, the income of the estate, will necessarily put her to an election. But when a trust is created to receive the rents, profits and income, and apply the same according to the provisions of the will, in such manner and for such purposes as are inconsistent with the widow having her dower, then she must elect. This I understand to be the rule as deduced from the cases as reviewed and criticised in *Konvalinka v. Schlegel, supra*. It appears from the authorities that, where provision is made for a widow, it is deemed to be in addition to her dower. In *Church v. Bull*, 2 Denio, 430, the widow was given the whole of the testator's estate, real and personal, for life, or until she should remarry, and in *Lewis v. Smith*, 9 N. Y. 502, there was a devise to the widow of the whole estate for life, and yet in each case the

provision was held to be in addition to dower. The fact that in this case she receives the income and rents through trustees, while in those she received it directly, seems to me to raise no distinction that can be invoked to defeat her dower. In those cases the widow was given the benefit of the estate for life, or until remarriage. Here she receives the same only until the youngest child arrives at 21 years of age, when her interest in the estate under the will is entirely gone. Did the testator intend to not only deprive his widow of the income, by these provisions, but also of her dower? A provision, also, bearing against the claim that the testator intended the provisions of the will for his widow to be in lieu of dower, is that he disposes of his estate so as to deprive his widow of any interest therein, or benefit therefrom, as rapidly as each child arrived at 21 years of age, and even the homestead farm passes into the control of the children, absolutely, when the youngest child reaches that age. Even at the time of making his will, it may be inferred, from circumstances appearing therein, that some of his children were then near the age of 21 years. Even the rents and income, during such time as she was entitled to receive the same, were to be applied by her to the support of her children as well as herself. My conclusion, therefore, is that the credit of \$1,133.20, as a payment to the widow for dower in the executor's accounts, is not a proper one, and authorized to be made by him, as executor; for the sale made by him must be presumed to have been made subject to the right of dower of the widow, to the extent of the prices at which the lots were sold, and, if not, the executor was not authorized to purchase her dower. On the other hand, if my conclusion be erroneous—that she had a right of dower—then the payment was without consideration, and wrongfully made, as she had no estate for which she should have been compensated.

Objection is made by the contestant to various items of credit in the accounts of the executor. The one of \$161.38, for repairs on the Third avenue property, I think, should stand. The

evidence shows the same to have been paid by the executor. There is no proof that the same was not necessary. I think the executor had the right to make repairs to preserve the property, and to obtain a proper income therefrom.

The items for taxes, it seems to me, are not chargeable to the principal estate. The will expressly provides that the widow shall pay the same out of the income. They were not payable out of the principal estate, and, in any event, not until it appeared there was insufficient income for that purpose, and that such payment became necessary for the preservation of the estate. Of course the taxes paid by the executor are proper credits against the income fund.

The items for insurance, I think, are proper credits. Such payments are not expressly authorized by the will, but I think they are impliedly authorized. The executors appear to have been clothed with a trust authority over the estate, and it seems to me that they should be credited with the payments which are proper in the management and preservation of the properties under their charge.

The item of \$40.09 for repairs on the Mt. Moor Hotel appears to have been paid in the year 1887. The testimony of the executor shows that this property was sold in the fall of 1885. I am therefore unable to understand how these repairs are chargeable to the estate, and the same must be disallowed.

The item of \$63.63, being the amount of a judgment against his brother David, it does not appear has any connection with the administration of the estate. So far as the proof shows, it is a personal matter between the executor and his brother.

The credits \$9.50, \$25 and \$25, for expenses incurred in making the resale of the Third avenue property, I think, should stand. This resale was directed by the court, and the same seems to have been necessarily incurred to carry out such direction.

The item of \$76.25, being the bill of Mr. Stafford for legal services, is not chargeable, except in part, to the estate. For

preparing the deeds of the Nyack lots, and incidental services in that behalf, he served the executor, but in other respects he appears to have acted for the widow. The same may be allowed as a credit to the amount of \$20, the balance being disallowed.

The credit of \$1,218.01, for goods claimed to have been furnished to the widow, cannot stand against the principal estate. If the same is chargeable, it is only against the widow, to whom he claims to have furnished the goods. But I do not consider the proof sufficient to establish the same against her, as a payment on account of the income. If the executor has a claim for this merchandise against the widow and minor children, it appears to be an individual one, for which he must seek redress in some other court. The same may be said of the item of \$280.97, for goods furnished to the legatee and devisee Loretta Storms. I find no sufficient proof to establish this as a payment, and it is only upon such a basis that the same may stand as a credit. No vouchers appear for the payments to this legatee.

As to the \$162, paid Polly Demarest, for interest that had accrued between the first and second sales of the Third avenue parsonage lot, I am unable to see from the evidence that the same should stand as a credit. This mortgage was an individual obligation of the executor, given by him upon this lot after he became the purchaser thereof from his brother David. The payment of the interest was the discharge of his personal obligation, and I fail to see, from the evidence, how it became one that should be charged against this estate.

The credits for the costs paid in the two suits brought against the executor by his brothers Benjamin and Charles, for the respective sums of \$251.98 and \$221.55, should be allowed, as the judgment rolls show a recovery thereof against the executor, as such. It seems to me that, under the proofs, I am bound to regard the same as sums for which the estate is chargeable. If the executor had been deemed chargeable personally, it would seem that the Supreme Court would have so decreed. Although

it seems, however, that though not charged against him personally, that is not conclusive that they were incurred in good faith. *Tucker v. McDermott*, 2 Redf. Sur. 319. As to whether or not the executor is entitled to be reimbursed for expenses paid or incurred by him for counsel and attorneys' compensation in the prosecution or defense of suits by or against him, as such, depends upon the nature of the suit, and his good faith in the matter. Redf. Pr. 473; Code Civil Pro. section 1916. In all cases, executors and administrators are entitled to such allowance for their actual and necessary expenses "as shall appear just and reasonable." 2 Rev. St. p. 93, section 58, as amended by chapter 362 of the Laws of 1863. An executor does not become entitled to reimbursement for sums expended for legal services by merely showing the fact of payment, nor even, in addition, that he has acted honestly and in good faith. Upon objection made, he must prove the necessity and value of such services. *St. John v. McKee*, 2 Dem. Sur. 236. An executor or administrator is bound to satisfy the surrogate of the necessity and reasonableness of the claim made by him for sums expended as counsel fees. *Willson v. Willson*, id. 462; *In re Peyser*, 5 Dem. Sur. 244. I am not satisfied, from the proofs, that there was any good reason for the executor defending these suits in which these expenses were incurred, or that he exercised good faith and fair judgment in refusing the demands of the plaintiffs before suit, and thus forcing the litigation. However, I do not pass conclusively upon these allowances claimed for counsel and attorneys' charges, but reserve my determination until the settlement of the decree. Indeed, as to all these items of disbursement, I will hear counsel further upon such settlement, so that I may correct any erroneous impressions I may now entertain as to them, or any of them. A separate statement of principal and income should appear in the accounts. Let a decree be presented for settlement and entry, accordingly, upon notice; costs to be then adjusted.

In re WILLIAMS' ESTATE.

(1 Misc. Rep. 35.)

*(Surrogate's Court, Cattaraugus County, Filed September, 1892.)***1. REAL ESTATE—SALE TO PAY DEBTS.**

A petition for sale of real estate to pay debts alleged a large indebtedness of decedent to petitioner, that the only personal property realized by petitioner, as administrator, was \$10, and that he had proceeded with reasonable diligence in converting the personal property of decedent into money and applying same to the payment of debts, *held*, that although the petition, as required by section 2752, subd. 4, Code Civ. Pro., did not explicitly state what application had been made of the personal property which came to petitioner's hands, or the amount which might yet be realized therefrom, yet, as the petitioner was the only debtor, and as he could not make payment upon his own claim till it was established, the petition in fact disclosed that the petitioner had made the only legitimate application of the moneys which had come to his hands (*viz.*, to hold same until his claim had been established), and that the amount which might yet be realized therefrom to apply upon his claim when established, was the sum of \$10.

2. SAME—CODE CIV. PRO. SEC. 2759, SUBD. 5.

In such a case, the administrator has proceeded with reasonable diligence in converting the personal estate into money, and applying it in the payment of debts and funeral expenses, within the meaning of Code Civ. Pro. sec. 2759, subd. 5, although he did not actually apply the \$10 towards the payment of debts.

3. SAME—DISPUTED CLAIM.

In a proceeding for the sale of real estate to pay debts, the court has jurisdiction to determine the validity of any claim, although disputed, even though it be that of the administrator.

4. LEASE—COVENANT TO MAINTAIN LESSOR.

A lease for twelve years contained a covenant by lessees that they would maintain lessor during the term, as payment for the use of the premises. Lessor died prior to the expiration of the term. *Held*, that his maintenance during his life was a full performance of the covenant by the lessees.

5. EQUITABLE MORTGAGE—WHAT CONSTITUTES.

Decedent having leased his farm, subsequently made an agreement with lessee that latter would build a barn thereon, and that lessor would pay him the reasonable value of same on the expiration of the lease, and in case lessor should die meanwhile, lessee should have a legal claim against lessor's estate for the value of said barn. *Held*, that although lessor had no personal property at the making of such agreement, lessor did not intend to make the value of the barn a lien upon his estate, but merely made an admission of his indebtedness.

6. COVENANT AGAINST CUTTING TIMBER—FIREWOOD AND FENCING.

Such lease contained a covenant by lessee against cutting timber except for firewood and fencing purposes. Lessee, instead of repairing the fences from timber cut on the farm, sold same, and devoted the entire proceeds to purchasing other material which was used in repairing the fences. Lessee did not sell any more timber than was necessary for such repairs. *Held*, that the covenant was not substantially violated.

Petition to sell real estate for payment of debts. Granted.

C. Z. Lincoln, for petitioner; C. D. Van Aernam and H. R. Curtiss, for contestant.

DAVIE, S.—This is a proceeding for the disposition of decedent's real estate for payment of debts. Lyman Williams died, intestate, April 10, 1885, letters of administration upon his estate were issued to the petitioner March 7, 1892, and the petition in this proceeding was filed on the 12th of the same month. On the return day of the citation the contestants moved for a dismissal of the proceedings, claiming that the petition failed to comply with the requirements of subdivision 4, section 2752, Code Civil Pro., and that it was insufficient to confer jurisdiction. The motion was at that time denied, but is renewed upon the final submission of the case. The section of the Code referred to requires the petition in a proceeding of this kind, when made by an administrator, to state the amount of personal property of decedent which has come into his hands as such administrator, the application thereof, and the amount which may yet be realized therefrom, and it is undoubtedly true that,

if the petition fails to disclose such facts as are required by the statute to be shown, the surrogate acquires no jurisdiction. *In re German Bank*, 39 Hun, 181. The petition in this case alleges with sufficient accuracy an indebtedness of decedent to the amount of \$1,559, and further states that the petitioner has discovered the personal property of decedent to be insufficient to pay his debts, that the amount of personal property of decedent which has come into his hands as such administrator is \$10, and that he has proceeded with reasonable diligence in converting the personal property of said decedent into money and applying the same to the payment of debts. The criticism passed upon the petition is that it fails to explicitly state what application has been made of this personal property, or the amount which may yet be realized therefrom. The circumstances of this case, as disclosed by the petition, are somewhat peculiar. The only indebtedness of the decedent is the claim of the petitioner, and he is the administrator. This being the case, the only application he was authorized to make of the moneys belonging to the estate was to hold the same until his claim had been properly established. He was not authorized to make payment upon his own claim until so established. *In re Gardner*, 5 Redf. Sur. 14. So then, the petition does, in fact, disclose that the petitioner has made the only legitimate application of the moneys which have come into his hands, and that the amount which may yet be realized therefrom to apply upon his claim when established is the sum of \$10. Aside from this suggestion it would not seem that any application or actual paying out of this \$10 is a condition precedent to the right of the petitioner to institute these proceedings. The purpose of the statutory requirement referred to is to prevent a resort to the real estate for payment of debts until it is made to appear that the personal estate, which is the primary fund therefor, is insufficient for that purpose. The law governing proceedings of this kind has undergone various changes. The original statute of 1801 permitted the administrator to institute such proceedings

whenever he discovered or suspected that the personal estate was insufficient to pay the debts. The Revised Statutes of 1830 authorized such proceedings only when it was made to appear that all the personal estate applicable to the payment of debts had been actually applied, leaving no discretion whatever on the part of the surrogate. This statute was amended by the Laws of 1837 so as to restore to the surrogate a discretion in the matter. The amendment provided that the surrogate might, in his discretion, order a disposition of the real estate, although the whole of the personal property of the decedent which had come into the hands of the administrator had not been applied to the payment of debts. The present statute permits such a decree to be made when it appears that the administrator has proceeded with reasonable diligence in converting the personal estate into money and applying it to the payment of debts and funeral expenses, and that it is insufficient for the payment of such debts, leaving it to be determined from the facts of each case as to whether the administrator has used due diligence in this respect or not. Subdivision 5, section 2759, Code Civil Pro. I am of the opinion that the petition in this case, showing a somewhat large indebtedness, a very small amount of personal assets, and a valid reason for not actually applying or paying out the same, discloses due diligence on the part of the administrator, and is in substantial compliance with the requirements of the statute.

As already suggested, the only indebtedness of the deceased is the personal claim of the petitioner, and it is urged by the contestants that the surrogate has no jurisdiction to determine the validity of such a claim, except upon judicial settlement. This suggestion is based upon the provision of the Code that, "upon the judicial settlement of the accounts of an executor or administrator, he may prove any debt owing to him by the decedent." It has been decided that the surrogate has no jurisdiction to entertain a proceeding solely for the purpose of proving such personal claim (*In re Ryder*, 129 N. Y. 640, 29 N. E. Rep.

309); but in proceedings for the sale of real estate, Surrogate Courts have jurisdiction to determine the validity of any claim against the estate, although disputed (*In re Haxtun*, 102 N. Y. 157, 6 N. E. Rep. 111; *People v. Westbrook*, 61 How. Pr. 138; *Kammerrer v. Ziegler*, 1 Dem. Sur. 177; *Hopkins v. Van Valkenburgh*, 16 Hun, 3). The fact that the claim which is sought to be enforced in a proceeding of this kind is that of an administrator does not deprive the Surrogate's Court of the power to determine its validity. The principal controversy in this case arises over the amount and validity of petitioner's personal claim, which arose out of the following facts: On the 10th day of August, 1880, decedent was the owner of a farm of 237 acres, and a considerable quantity of personal property thereon. On that day, by an instrument in writing expressing a nominal consideration, decedent sold all of said personal property to the petitioner and his daughters, Almera A. and Jerusha A. Williams, one-half to the former, and one-quarter to each of the latter. On the same day decedent executed a lease of his farm to the same parties for a term of 12 years from March 1, 1880. This lease contained the following agreement:

"And the said parties of the second part covenant that they will pay to the party of the first part for the use of said premises as follows: That they will board, clothe, take care of, and support the said Lyman Williams on the said premises during said term of twelve years."

The lessees continued to operate said farm together until September 13, 1881, when Almera assigned her interest in said lease and personal property to the said petitioner, and on February 10, 1882, the other sister assigned her entire interest to him. On the 25th day of October, 1881, decedent and petitioner entered into a contract in the following form:

"Whereas, I have let my farm in Mansfield, Catt. Co., N. Y., for the period of twelve years to my son, John Williams, and whereas, a new barn is necessary on said farm for the use of the same, it is therefore agreed between myself and my said son,

John Williams, that he may erect a barn on said premises, and that I will pay him what the same is reasonably worth at the time of the expiration of his said lease, in case he should not in the meantime become the owner of the premises; and in case I should die before the expiration of the said lease he shall have a legal claim against my estate for the reasonable value of said barn.

LYMAN WILLIAMS.

"Dated Oct. 25, 1881."

Petitioner constructed said barn in compliance with said contract, and the same was reasonably worth \$1,227 at the date of the expiration of said lease. The decedent was supported and maintained on the premises to the time of his death. Petitioner continued to occupy the farm after decedent's death under said lease until the expiration of the term. It is urged on the part of the contestants that, inasmuch as the petitioner occupied the farm from April 10, 1885, the date of the death of the decedent, to the expiration of the term of the lease, March 1, 1892, without paying rent, the fair rental value of the farm during said period, or a sum equal to the support and maintenance of decedent during that time, should be set off in this proceeding against petitioner's claim. Assuming a claim for unpaid rent against the petitioner to be a proper counter-claim, the question arises, does the petitioner owe any sum for the rent of the farm? What was the intent of the parties in making the lease? Was it the design that the care and maintenance of the decedent should operate as a satisfaction of the rent to the time of decedent's death only, or during the entire term in case decedent died prior to the expiration of the term? These are somewhat novel questions, but I am firmly of the opinion that the maintenance of decedent during his life was a full performance of the conditions of the lease on the part of the petitioner. At the time of making the lease, decedent was an aged man residing on said premises with the lessees, and his evident design in making such lease was to give the lessees the use and occupancy

of the premises during the term, securing to himself, however, a suitable provision for support during such part of the term as he might need the same. This was all that decedent expected; it was not anticipated that a money rent was to be paid during any portion of the term. Supposing the decedent, instead of dying on April 10, 1885, had then become, and during the balance of said term remained, a helpless invalid, no one would claim that petitioner could avoid the responsibility of taking care of and supporting him, although such care might be worth many times the rental value of the farm, and petitioner could not have relieved himself from such liability by abandoning the possession of the premises. There can be no equity in holding that it was the intention of the parties that all the probable advantages of this arrangement were to inure to the decedent, and all the disadvantages to the petitioner. If the decedent had voluntarily removed from said premises without the fault of the petitioner, and had not asked for or demanded his support, no claim could have been made against the petitioner upon his covenant in the lease. *Pool v. Pool*, 1 Hill, 580. It cannot be held that the death of decedent during said term, thereby terminating the necessity for his further maintenance, ended the lease so as to render petitioner liable for the use and occupation of said premises thereafter, or that his death so operated as to change the covenant of the lessees to maintain decedent into an obligation to pay money rent. It must be held that petitioner has fully satisfied all claims against him for the use of the premises during said term.

Contestants further urge that, if petitioner has any valid claim, the amount thereof is made a charge upon decedent's real estate, and that for that reason these proceedings cannot be maintained. This claim is based upon that provision of the Code authorizing a creditor of a decedent, other than a creditor by judgment or mortgage which is a lien upon the decedent's real estate, to institute proceedings of this character. Code Civil Pro. section 2750. The contract under which petitioner's claim

arose provided that, in case decedent should die, petitioner should have a legal claim against his estate; and, in view of the fact that at the time of making such agreement deceased had no personal property, it is asserted that this contract was in the nature of an equitable mortgage on the real estate. While it is true that an equitable mortgage may be constituted by any writing from which the intention to mortgage may be gathered (*Payne v. Wilson*, 74 N. Y. 348), the statement referred to in the contract for building the barn does not evidence an intent on the part of deceased to make the reasonable value of this barn a lien upon his real estate. The most that can be claimed for such statement is that it is a solemn and formal declaration and admission on the part of the decedent of an indebtedness against the estate.

Again, contestants assert that the evidence discloses a violation of the covenants in said lease on the part of said petitioner against the cutting of timber on said farm. The lease gave petitioner the right of cutting timber for firewood and fencing purposes. It became necessary, from time to time during said term, to rebuild and repair the fences on the farm. The petitioner in some instances, in place of building such fences from the timber on the farm, sold timber therefrom, and with the proceeds of such sale purchased other material for fencing, which was used on the farm, and it does not appear that petitioner disposed of any more timber than was actually necessary to keep said fences in repair; and, so long as he used the entire proceeds of the sale of timber for the purposes of refencing, the contestants have no substantial cause of complaint. The farm at the beginning of the lease was supplied with road line and division fences to some extent. In the operation of said farm it became necessary to rebuild a portion thereof, to remove other portions, and to erect new division fences where none had been before. It is claimed by contestants that petitioner did not leave the fencing in as good condition as when he took possession, but such claim is not supported by the evidence. I fail

to discover, from a careful examination of all the evidence, any substantial breach of any of the covenants of said lease on the part of petitioner.

A decree should be made directing a disposition of the real estate described in the petition, and establishing petitioner's claim to be as above stated, to wit, \$1,227 for the building of said barn, and \$59 and interest on the same from July 10, 1885, for funeral expenses paid by petitioner.

In re ARCHER.

(Surrogate's Court, Rockland County, Filed March 10, 1892.)

1. EXECUTORS—ACCOUNTING—LIABILITY FOR PROFITS OF BUSINESS.

When the profits of a business carried on by the executors jointly with a third person are not accounted for during a certain period, and there is no proof that the same were received by the accounting executors, or that the same were lost to the estate by their negligence, they should not be charged therewith, especially upon the contention of a contestant who was himself an executor during the period in question, and who had special supervision over the business out of which the profits arose, but who had been subsequently removed from the executorship.

2. SAME—TRUST ESTATE—LIABILITY FOR REPAIRS AND TAXES.

Testator devised all his property to his executors upon trust to receive the income thereof during the life of his widow, and pay the same to his widow and children, and he directed that should his sons C. and G. and his wife desire to reside in his dwelling house they might do so without paying rent therefor during his wife's lifetime, each paying one-third of the living expenses of the household. *Held*, that the widow and such children did not take an estate in the dwelling house analogous to a life estate, so as to charge them with repairs and taxes, as the executors took a legal title, with the duty not only of receiving the income, but of discharging thereout all taxes, insurance and repairs, and pay over the balance in accordance with the directions of the will.

3. SAME—SET-OFF.

To entitle the executors to credit for the price of goods of the estate sold by them, and which the purchaser owes the estate, it should be shown to be uncollectible without their fault, or that actual credit has been given (and not merely intended to be given) in the nature of a payment or set-off on an account or claim against the estate.

4. SAME—PROOF OF PAYMENT—VOUCHER.

When there is no voucher for an expenditure, the burden is upon the executors to establish the credit by the uncontradicted oath of the accounting party, stating positively the fact of payment, etc. Code Civ. Pro. sec. 2734.

5. SAME—DEBT DUE BY A CONTESTING EXECUTOR.

Contestant will be charged with a debt due by him to the estate, when the same appears by the evidence of one of the executors to be the balance due by contestant out of wood and brick transactions between him and the estate, although the contestant claims that the item was the amount of a loan made by him to the executors and repaid to him, when his testimony is unsupported, and as he was himself an acting executor at the time, he could have had an entry made in the executors' books, showing that it was a loan, the actual entry being "Dif. in brick and wood account, \$277.66."

6. EXPENSES OF ADMINISTRATION—REASONABLENESS OF EXPENDITURE.

Items of an executors' account for administration expenses, including professional services, in the absence of proof that such services were necessary for the protection or administration of the estate, and that the sum charged is reasonable in amount, should be disallowed.

7. EXECUTORS—TRUST ESTATE—RIGHT TO RENTAL INCOME.

Testator provided that should his son (the contestant) desire to reside where he now does (being a dwelling, part of testator's estate), he might do so without paying any rent during the testator's wife's lifetime. Contestant, after living in the dwelling for some time, removed elsewhere during the widow's life, whereupon the executors (who were directed by the will to receive the income of testator's property and apply the same as directed) let same to other tenants and received the rents thereof. *Held*, that the contestant was not entitled to such rents, as the will gave him only a right of occupancy during the widow's life, and that they belonged to the trust estate.

8. SAME—PURCHASE BY EXECUTOR INDIVIDUALLY.

When it appeared that the one-half interest in a barge, the other half of which was owned by the estate, was purchased for a consideration of \$2,300, and the bill of sale thereof taken in the name of one

of the executors, who claimed that he purchased individually, but all the circumstances connected with the purchase and the relation of the parties, showed that the purchase was in the interest of the estate, the profits of the barge paying the purchase money, save \$50 paid by the executor to whom the bill of sale was given. *Held*, that the purchase was one for the estate, and that the property thereby acquired, and the earnings thereof, should be accounted for as estate property and assets.

Judicial settlement of accounts of executors of Michael A. Archer, deceased.

Irving Brown, for executors; Alonzo Wheeler, for contestants.

WEIANT, S.—The testator's will was admitted to probate about the year 1881. Charles D. Archer and Allison M. Archer, the contestant, were appointed executors thereof, and authorized to then qualify. George A. Archer was named also as an executor, but not to qualify until he arrived at 21 years of age. Charles and Allison qualified at once, and entered upon their duties. George qualified in about the year 1883, on his arrival at 21 years of age. In a proceeding commenced in January, 1888, Allison was enjoined from acting further as executor, and removed as such later in said year by a decree in such proceeding. Since the commencement of that proceeding the accounting executors have continued to act in the administration of the estate. This proceeding is to settle and adjust their accounts.

In the consideration of the questions submitted to me for my determination I shall follow the order in which the same are presented by the counsel for the contestant, Allison M. Archer, who alone interposes objections. His first claim is that the accounting executors should be charged for the half earnings of a barge known as the M. A. Archer for a portion of the year 1885 and the whole of the year 1886. This was a vessel constructed in the year 1883 for the freighting of bricks from an estate brickyard. The arrangement under which this vessel was to be constructed and paid for seems to have been made

through one T. W. Johnson, whereby the Archer estate was to become half owner and Johnson the other half owner, and the barge was to be provided with freight from the Archer brick-yard. The Archers were to pay in part, and the remaining portion, one-half its cost, was to come from the earnings of the vessel. The barge cost \$5,173.16. The Archer estate paid to the builders \$1,000, and to Johnson \$329.22, on account of their half of such cost, leaving a balance of \$1,257.36 to be paid by the earnings of the vessel. It appears from the testimony that about July 5, 1884, the gross earnings of the barge had reached \$5,717.27, which, after deducting the running expenses of \$2,633.10, left a net result of \$3,084.17, to one-half of which the estate was entitled to credit in reimbursing Johnson. Evidently the whole of one-half of these earnings was not applied towards the payment of the balance due for the purchase price. Some other application of a portion of them must have been made, for it appears without contradiction that about January 6, 1885, Johnson and the executors had a settlement of the barge matters, and there then appeared to be a balance still owing on the Archer half of the barge of \$149.02. It seems to be conceded that for the years 1885 and 1886 following this settlement and the fixing of such balance, Johnson, as the master and part owner of this vessel, continued to operate the same as theretofore, receiving the freights and paying the expenses thereof. While for the preceding years the contestant, as an executor, kept the accounts of the barge, thereafter, for some reason undisclosed, he ceased doing so, and consequently the estate has no account of the earnings of the barge for either of the years 1885 or 1886. Johnson seems to have kept the only accounts, and to have received all the earnings. It is pretty clearly shown that in the early part of the season of 1885 the earnings of the vessel were sufficient to pay Johnson in full for the balance found due him in January preceding. The contestant testifies that he received no part of the barge earnings for either of those years, and the accounting executors deny that

they ever received the same. They concede the receipt of two payments of \$50 and \$160, respectively, arising out of some damage to the barge, and that thereafter there were earnings due the estate, but deny that they ever received any part of the same. Charles says that either his brother Allison or Johnson had these earnings. Allison denies the receipt of them, and thus from the testimony Johnson appears to be the one who has received and retained them. Johnson absconded some years since, and thus we have no testimony from him disclosing whether or not he ever paid the same over to either executor. The amount of these earnings thus left unaccounted for by any one is considerable. It seems from the evidence that for the balance of the year 1885 the one-half earnings of the barge approximated \$600, and for the year 1886 the approximate sum of \$800; thus making an amount of some \$1,400 unaccounted for by either executors. Without some proof that the same were received by the accounting executors, or were lost to the estate because of their negligence in the administration of the estate they should not be charged with these earnings, upon the contention of this contestant. He was also an executor during these years, and also during 1887, and if these earnings were lost to the estate he was at fault also, because of his failure to collect the same. It was as much his duty as that of his brothers to give this matter his care and attention. Indeed, from the course of business between the executors in the management of the estate the barge matter had been one under the special supervision of the contestant. He is the only contestant, and his claim comes with less force than if made by one interested in the estate, but who had not participated in its administration. It seems that, as matter of law, he is precluded from charging the other executors. *In re Niles*, 113 N. Y. 547, 21 N. E. Rep. 687, and cases cited.

As to the balance of the earnings of the barge for the year 1888, of \$420.37, the executors concede that the same is correct, and that they should be charged therewith. The counsel for

the contestant claims that the item of credit of \$31.50, "freight on wood," in schedule 1, No. 8, of the accounts, should be disallowed, on the ground that the proof shows it to be a part of the item of \$122.19, in the same schedule, "A. M. Archer, Agt." The testimony of the contestant, Allison M. Archer, is to the effect that but \$90 of this latter sum was all that was actually paid; that the payment was by check, which was produced and put in evidence. He says that this \$122.19 was for wood that he had furnished the estate, and that this \$90 was paid to him, and the balance of \$31.50 to the captain of the vessel that delivered the wood. Neither of the executors denies the truthfulness of this version of the transaction, and I therefore find that the credit of the \$122.19 is erroneous, and the same should be disallowed, except to the amount of \$90, unless vouchers are produced for both of the payments claimed. The evidence shows, and the executors' counsel substantially concedes, that certain items of credits in the accounts should be corrected by reducing the same as follows: Bill of James Osborne, \$10.42; bill of Daniel D. Williams, \$2.60; bill of Edward J. Peck, \$12.69; Glassing bill, \$1.50; Blauvelt bill, \$10.04; also an error of \$5.50 in the item of \$43.50 for roller, and \$4 paid to Dr. Owen. In regard to the payment to William Decker of \$73.46, his testimony shows that but \$3 of this bill was for work done for the estate, and that the rest was for services at the homestead, for which the contestant was not bound to contribute. This, then, should be corrected so that the executors receive credit on this accounting for the \$3 only. The contestant's counsel objects to the allowance of any credits for expenditures upon the homestead dwelling and other buildings appertaining thereto. The particular items objected to are the bills of George Redner, Gordon & Dutcher, Lewis W. King, all for painting; Springsteen & Gourley, \$8.80, carpentering; C. T. Reynolds, for paints; and also all taxes levied upon and paid for the homestead property. He bases his objection upon the ground that the widow and the two sons, Charles and George, are, under

the will, given an interest or estate in such homestead analogous to a life estate, and that they are personally, as such tenants, obligated in law to pay for all such repairs and to discharge such taxes. If such is the interest or estate given, it would seem that the objection is well taken, but I do not construe the provisions of the will as devising such an estate. The testator devises and bequeaths all of his property, real and personal, to his executors, "in trust to receive the rents, issues and profits thereof for and during the lifetime of my widow, Clarissa A. Archer, and apply the same to the use of the following persons, as follows: Pay one-third thereof to my said wife during her lifetime, and the other two-thirds thereof to my three sons, Allison M. Archer, Charles D. Archer, and George Archer, in equal proportion during the same time." The testator then makes this further provision:

"Should my sons Charles and George and my said wife desire to continue to reside in my dwelling house where I now reside, then my will is that they may occupy my said dwelling house, and the lot and barn used therewith, and the furniture and property in the house and barn, so long as they desire so to do, without paying rent therefor during the lifetime of my said wife, each paying one-third of the actual living expenses of the household." "Should my son Allison desire to reside where he now does, my will is that he may do so without paying any rent during the lifetime of my said wife." "Should my three sons and my wife desire my son Allison and his family to reside with them where I now reside, then my will is that he may do so, so long as they desire." "The provisions herein made for my said wife are in lieu of her right of dower in my property."

Thus it appears that the estate is devised in trust to the executors, including the homestead dwelling, lot, and barn, and in them was lodged the legal title, with the duty of maintaining and protecting the same during the continuance of the trust, during the widow's lifetime (*Stevenson v. Lesley*, 70 N. Y. 512; *Crooke v. County of Kings*, 97 N. Y. 421); and it was their

duty to not only receive such rents, income and profits, but out of the same to pay and discharge all taxes, insurance and repairs, and pay over the balance in accordance with the directions of the will. *In re Brewer*, 43 Hun, 597; *Young v. Brush*, 28 N. Y. 667. A trustee may, at the expense of the estate, cause necessary repairs to be made to the buildings. *In re Odell's Estate (Surr.)*, 4 N. Y. Supp. 463; *In re Jones*, 37 Hun, 430. Here the entire estate is given in one general trust, and the entire estate must therefore discharge such liabilities. I do not see that any discrimination can be made either in favor of or against any party for expenses incurred as to any particular part or portion of the estate. The testator clearly intended to merge the whole income of the estate, and to have the same distributed or paid over as directed, after deducting therefrom all proper expenditures in maintaining and preserving the trust properties and the expenses of administering the trust. The right to occupy the dwelling and homestead property given to the widow and two sons was not intended to divest the title and supervision of the executors of that portion of the estate, nor to relieve them from the care and protection of the same. The testator relieves the widow and sons from paying rent, and only imposes upon them the payment of the "actual living expenses of the household." If it was his purpose to have them pay or to be charged with the further expenses of repairs and taxes, it would seem that he would so have expressed his wishes. He therefore left that property, as well as all other, including also the premises where the contestant then resided, and a right of occupancy of which was given to him free of rental, also, during the lifetime of the widow, under the charge of the executors. It therefore appears that these items of payments for repairs and taxes were properly chargeable to the estate generally, and the credits in their accounts should stand. *Hancox v. Meeker*, 95 N. Y. 528.

The item of \$90.50, as paid to Jones & Furman, is not properly a credit, as the testimony stands. It was for coal sold to that firm, and for which they owe the estate. To entitle the

executors to such credit it should be shown to be uncollectible without their fault, or that actual credit had been given in the nature of a payment or set-off on an account or claim against the estate. This latter is what it is claimed to be done upon a settlement or adjustment with Jones & Furman, but until that is done the credit cannot stand. Charles Archer's testimony shows that no actual credit or payment had been allowed by Jones & Furman.

The item of \$15.70 to C. C. Cooper for hay is not established. Allison Archer testifies that the hay was for the private or individual purposes at the homestead, and Charles has no recollection about it. I find no voucher, and the burden is upon the executors to establish the credit. To establish such an expenditure, the same must, where there is no voucher, "be supported" by the "uncontradicted oath of the accounting party, stating positively the fact of payment," etc. Code Civil Pro. section 2734.

Objection is made to the credit of the sum of \$361.26, which forms a part of the item of \$638.92, in a charge against the contestant in schedule K, under date of May, 1885. As to this credit, Charles Archer, in his testimony, says that this charge of \$638.92 against the contestant is made up of two items—\$277.66 and \$361.26—as shown by the personal account book at the top of pages 100 and 101. This book contains the following entry at the top of page 100: "Dif. in wood account, 1883 & 84 overdrawn" \$361.26. On page 101: "Dif. in brick and wood acc't, \$277.66." The contestant testifies that this \$361.26 was for money he loaned "them" (meaning the other executors), and that they paid him back; and he says they never charged that to him until he was set aside as executor. He said this latter statement could be proved by a Mr. Markham, but that was not done. George Archer was asked to explain this item, and, as I understand his testimony, this balance of \$361.26 arose out of wood and brick transactions between the contestant and the estate, upon an adjustment of which there remained a balance due from him to the estate, and which was

entered as a charge against him in his individual account. I do not understand that the accounting executors ask any credit for paying that sum. It is simply a question of whether or not the charge shall stand as an item against the contestant. This testimony of George, and his explanation of the matter is not denied by the contestant, except by his testimony that I have cited. It seems to me that at this late day, upon this evidence, the contestant cannot avoid this charge against him. It seems strange, if it were a loan, that such odd figures would have appeared. Again, if it were to repay a loan, there should be something to appear in written form to sustain that claim. At that time the contestant was an acting executor, and during the years following it seems that he would have had some entry thereof made upon the books to show that this was a loan, especially where it does not appear that he had a writing to show it to be a loan. I think the charge should stand.

The contestant claims that either the item of \$175 of "Schedule I, No. 8," "September 29, 1881, schooner G. Harrington (cargo of wood)," or "\$176, September 30th, Capt. schooner General Harrington, balance on cargo wood," should be disallowed, on the ground that the items relate to one transaction, and that but one payment was made. Charles Archer testifies that in a former proceeding the contestant testified that he made payments for two loads of wood at the same time, and to the same person; that these payments were actually made; that Capt. Ward was the captain of the General Harrington, and that he was also financial agent for the Lawrence. Charles further testifies that these two payments were actually made to that captain; that both boats came along at the same time; and that they were settled for at the same time. It will be observed that these entries were made in the books in 1881; that the contestant was then, and for several years thereafter, an executor, and actively participating in the administration of the estate, and that no objection was ever made to the same, although settlements or examinations of the accounts were had. Under the circumstances, I am of the judgment that these credits should

stand. Indeed, if he was then an executor, it seems to me that he is attacking credits which he himself might be called upon to substantiate.

I do not think that the objections should prevail as to the payments to the Brick Manufacturers' Association. These payments seem to have been made through or by reason of some arrangement of the brick manufacturers for their benefit and the trade. I am not prepared to say that the payments were not legitimate, under the circumstances.

An objection is made to the allowance of the payment of the item of \$250 to Calvin Frost, as counsel fee, for services rendered and advice given the executors. The only entry as to the same appearing in the accounts filed is, "Calvin Frost, attorney, \$250." Nothing there appears as to the services of counsel for which the payment is claimed to have been made. The only testimony as to this item appears to have been given by the executor Charles D. Archer. He identifies a receipt for the payment of this sum to Mr. Frost, and says that payment was for an opinion; that subsequently a proceeding was brought against his brother, who is this contestant, to remove him as executor, and that Mr. Frost was consulted all the way through that proceeding. This is, in substance, all of his testimony as to what the payment was for. The opinion is not before me. I do not consider the proof sufficient to call for the allowance of this item. So far as that proceeding is to be considered, the executors were fully represented by other able and competent counsel, who was fully paid, and the executors are credited and allowed for all such expenditures. To entitle them to incur an expense chargeable to the estate for further counsel, some proof should have been adduced showing the circumstances which made that necessary for the proper administration and protection of the estate. Nothing of that kind appears. The burden of proof was upon the executors to establish this charge. The mere fact of payment by an executor or administrator of a sum of money is not sufficient to cast the burden of impeaching its justice upon the objector. Estate of Nocken, 15 N. Y.

St. Rep. 731; Estate of Harnett, id. 725. Items of an account of executors or administrators for professional services and otherwise, in the absence of proof that such services were necessary for the protection or administration of the estate, and that the sum charged is reasonable in amount, should be disallowed. *In re Casey's Estate* (Sup.), 6 N. Y. Supp. 608; *In re Collyer's Estate* (Surr.), 9 N. Y. Supp. 297; *St. John v. McKee*, 2 Dem. Sur. 236; *Willson v. Willson*, id. 462; *In re Rowland*, 5 Dem. Sur. 216. Nor is the production of a voucher, simply showing such payment, sufficient where objection is interposed. *Estate of Nocken, supra*; *Estate of Harnett, supra*. There seems to be some conflict among the authorities touching the question of the burden of proof where a voucher is produced for the payment, but I am of the judgment that as to the expenses of the administration of an estate the burden is upon the accounting party to show the necessity of the expenditure and the reasonableness of the charge. In *Valentine v. Valentine*, 3 Dem. Sur. 597, the learned surrogate seems to hold the contrary. He cites as an authority sustaining his conclusion, *In re Frazer*, 92 N. Y. 239. In that case the item under consideration was a credit for the payment of a debt of the deceased. The claim, as the court there states (at page 247), "was based upon an alleged contract with the deceased, and presented and sworn to in the ordinary manner." There is reason for the application of such a rule in that case. The statute points out the method of authenticating debts or demands against a deceased person's estate, and, when thus authenticated and presented, the inference is that the same is proper and just; and the executor or administrator, when supplied with such a voucher, may rely upon the same to entitle him to an allowance thereof in his accounts, unless some objector presents proof to overcome this inference or presumption. And as to debts or demands of the testator or intestate the personal representative is not supposed to possess any personal knowledge, and it is but just that he should, in the first instance, be entitled to rely upon the compliance with the statute as sufficient to protect him until

contrary proof be submitted. As to the expenses of administration, the personal representative who incurs them is supposed to have full knowledge thereof, while the persons interested in the estate are most probably uninformed as to the same, and, if objection is interposed as to the allowance of any such expenditures, I see no hardship in requiring proof from the accounting party of the necessity and reasonableness of the expenditure. The distinction above indicated was recognized in *Journault v. Ferris*, 2 Dem. Sur. 320. In *Re White*, 6 Dem. Sur. 375, it was held that where an executor filed a voucher for the payment made by him for services of counsel, from which it appeared that the expense incurred was necessary, just and reasonable, the burden of impeaching such payment was cast upon the contesting party. I am not prepared to say that in no case can such facts be embodied in the voucher, and form legitimate proof against a contestant as to the necessity and reasonableness of the expenditure, but it is sufficient to say that does not appear in this case. This item, upon the proof, is therefore disallowed.

The testator, as we have stated above, made this provision in his will: "Should my son Allison desire to reside where he now does, my will is that he may do so without paying any rent, during the lifetime of my said wife." This son, the contestant, then resided in a dwelling which constituted a part of the estate of the testator. He continued to reside there until April 1, 1882. He then removed therefrom; from what appears, voluntarily. There is no proof that he has ever been excluded from the occupancy of this dwelling, and yet he contends on this accounting that he should receive the rentals from the executors which they have collected from tenants who have since his removal occupied the same. This claim is without foundation. The executors were entitled to receive all income from the estate; and when the contestant abandoned these premises he surrendered all control over the dwelling apartments, and it devolved upon the executors to assume possession and control of the same, and to obtain an income therefrom as a part of the estate.

The contestant's interest was simply a right of occupancy as a home for himself and family. As soon as he abandoned or surrendered this right by removing therefrom, he gave up all benefit to be derived from the same, given him under the will. The rentals received by the executors for this dwelling therefore constituted a part of the estate, and is distributable with the other income in accordance with the directions of the will.

We come now to the consideration of the remaining matter submitted by the contestant's counsel. About February 1, 1887, the one-half interest of T. W. Johnson in the above-mentioned barge M. A. Archer—the estate owning the other half—was purchased of Johnson for the consideration of \$2,300, and the bill of sale thereof taken in the individual name of the executor, George Archer. The contestant claims that this purchase was one for the estate, and that the property thereby acquired, and earnings thereof, should be accounted for as estate property and assets. George Archer claims that the purchase was an individual transaction, and that the estate has no interest therein, and that he is not accountable therefor as an executor. From a careful review and consideration of all the circumstances connected with the purchase of this half interest in this barge, and the relations of the parties, I have reached the conclusion that this purchase must be held to have been one in the interest of the estate, and which must be treated and considered as such on this accounting. This barge was first acquired in the belief that it would be a profitable investment as a part of the estate business. The earnings of the same for the years preceding the year 1887 had demonstrated that it was such from the profits realized therefrom. The earnings showed a large return to the owners of the vessel on the capital invested. The freighting was a usual and ordinary part of the brick manufacturing business, and a remunerative part thereof. In view of these facts, all of which were known to the executors, George Archer and Charles D. Archer, I do not believe that they, or either of them, should in equity be permitted to acquire this interest in the barge, as they have attempted to do, and shut out their

brother, the contestant, from participating in the purchase and sharing in the benefits of that undertaking. George claims that he made the purchase individually from Johnson. He received a bill of sale in his individual name, and gave his notes, he says, to Johnson for the purchase money, except that he paid \$50 to bind the bargain. That is all the cash he claims to have paid. The evidence shows that whatever has since been paid came wholly from the earnings of the barge. Upon examination of the notes that have been submitted to me as exhibits, I find that but three were given by George to Johnson, and aggregating but \$1,050. The bill of sales recites a consideration of \$2,300. How was the balance secured or adjusted with Johnson? As a part of the writings relating to this sale and purchase there was put in evidence a receipt from Johnson for all "dues and demands whatsoever either against the estate of M. A. Archer, or against George, Allison, or Charles, individually or as executors, barring a note against Allison for \$175." Does not this indicate that there was a "jumping" of matters between the estate, these executors, and Johnson? May not the unaccounted-for earnings of the barge for the years 1885 and 1886 have entered into this transaction? Charles Archer says the earnings of the barge were settled with Johnson early in the winter, and George says that a settlement was had with Johnson when he purchased the barge, and they went by Johnson's account. But, if this be not so, then it would seem that the balance of this \$2,300 was in some way realized through the note of Charles and George to the order of Nickerson, under date of January 29, 1887, and thus Charles appears to be clearly connected with the purchase, and another circumstance is added, indicating that it was an estate matter. George says he purchased individually, yet Charles is uncertain whether he had an interest in the purchase or not. He testified at one time that he regarded himself as having an interest in the barge equally with George. He says he told George that the barge was going to be sold, and said "Let 'us' try and get it." He says he was present at the conversation with Sherwood, who

indorsed the notes to be given to Johnson, and that he told him "we" would like to get the barge. He says that he will not be sure that none of the earnings of the barge which went to pay the notes belonged to the estate. He says he saw Johnson, and went around to Sherwood; that he was present at the purchase, and took part in the discussion or negotiation, and said to Johnson, "We will take it," referring to the barge. He testifies "we" gave the Sherwood notes. Notes have been submitted as renewals of these Johnson notes. Some are those of George Archer individually; some of Nickerson, to the order C. D. & G. Archer, and indorsed by them; and some made by Charles D. Archer and George Archer to the order of Nickerson; one from Charles to Sherwood, and bearing date during the period from January 29, 1887, to April 4, 1889. Some are mutilated by removing George's name. These circumstances indicate that Charles was also a party interested in the purchase, and that Nickerson & Co., who were the sales commissioners' agents of the estate, were called upon to lend their assistance, by way of accommodation, or else these notes represented the proceeds of sales of bricks, or advances. Charles states that the estate had discounts through the Second National Bank, where George kept his account.

If Charles is a party to be benefited by this transaction, why not Allison? There is nothing really prejudicial to the contestant's claim in the fact that the bill of sale was taken in George's name. The accounts and other evidence show that with the approval of all parties other valuable properties, purchased in behalf of the estate, were taken in the name of George alone, and yet conceded to be a part of the estate, in the benefits from which all are to participate. Then why not, also, in this barge and its earnings? George does not claim to have put but \$50 in the barge. Why should he absorb this profitable branch of the estate business to the exclusion of the others, made equal under the will of his father. The first half of the barge acquired by the estate was paid for by its earnings in two or three years. George knew this, and he ought not to be permitted to

acquire the second half to the detriment or loss of the estate, and paid for in the same manner. Charles, it seems, is interested in another barge, the Clara, furnished profitable freighting from the estate brickyards. It does not seem to me fair nor equitable that Allison should be shut out of his share of the benefits from this transaction. These executors occupy a fiduciary relation to the contestant in the administration of this estate, and they cannot equitably refuse to share not only all direct benefits, but also all incidental pecuniary advantages out of the same. If this be not so, then the trustee may, through his experience and observation in the management of trust property, learn of the incidental advantages and benefits that may accrue therefrom, and absorb and prosecute them to his individual profit. The law holding trustees to a faithful and honest administration of trust and fair and just dealing between persons associated together in fiduciary relations does not permit that. Equitable as well as legal rules are applicable. *Upton v. Badeau*, 3 Bradf. (Sur.) 13. A trustee cannot make any profit to himself from a secret transaction initiated while the relation of trustee and *cestui que trust* exists. *Green v. Green*, 2 Redf. (Sur.) 408; *Gardner v. Ogden*, 22 N. Y. 327; *Mitchell v. Reed*, 61 N. Y. 123. The principle of the rule of equity which prohibits purchases by parties placed in a situation of trust or confidence, that no such person can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account. *Van Epps v. Van Epps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cow. 717; *Willink v. Vanderveer*, 1 Barb. 599. This rule is recognized in *Harrington v. Bank*, 101 N. Y. 259-264, 4 N. E. Rep. 346. It is there stated to be a "well-established doctrine that a trustee cannot purchase or deal in the trust property in his own behalf, or for his own benefit, directly or indirectly. This is a rule of equity, and is not to be impaired or weakened." In *Mitchell v. Reed*, *supra*, Judge EARL, writing the opinion, says (at page 126), speaking of the relations of partners:

"The functions, rights, and duties of partners in a great measure comprehend both those of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. He can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested."

My conclusion is that this purchase of the Johnson half of the barge must be decreed to be one in behalf of the estate, and the purchase price paid, and the earnings of such half accounted for, as an estate transaction. In the adjustment thereof George Archer may be reimbursed for the cash he may have paid individually, and I will allow on such adjustment the \$186.50 paid by Charles and George Archer to Denton Fowler as the debt of Allison to Johnson evidenced by the \$175 note. It seems to me that this note was paid in connection with the purchase of Johnson's interest in the barge. It appears to have been a payment made without Allison's authority, as half of the amount paid was at the time charged on the books to each Charles and George individually, and they took an assignment of the note and debt from Fowler upon making such payment, which shows a purchase of the note as a debt to be thereafter collected by them. Allison should allow this payment, however, in the adjustment of the barge transactions on the settlement of the decree herein in the adjustment of the equities. Let a decree be presented accordingly for settlement and entry; costs to each party to be paid out of the estate.

In re VALENTINE'S ESTATE.
(1 Misc. 491.)

(Surrogate's Court, Westchester County, Filed January, 1893.)

1. EXECUTOR—TESTAMENTARY TRUSTEE—JURISDICTION.

An executor, who is directed by the will to sell his testator's real estate, invest the proceeds, pay the interest of one moiety semi-annually to testator's daughter for life, and upon her death, leaving issue, divide the principal equally amongst the children on their attaining 21, being a testamentary trustee, whose duties as such are separable from his duties as executor (Code Civ. Pro. sec. 2514, subd. 6), is liable to account for the proceeds of sales made by him, in the Surrogate's Court (Code Civ. Pro. secs. 2802-11).

2. SAME—WILL—DIRECTION TO SELL—JURISDICTION.

On such an accounting, the court has only power to charge the trustee with any proceeds of sale he has omitted to charge himself with, and (Code Civ. Pro. sec. 2811) decree payment and distribution. He cannot inquire into the validity of any sales of real estate made by the executor, by reason of fraud and the like.

Petition by Harriet A. Burtis, a residuary devisee and legatee under the will of George B. Valentine, to hold the executor liable in damages for certain alleged fraudulent sales of the testator's real estate made by him. The will directed the executor to sell all his real estate, invest the proceeds in bond and mortgage on real estate, pay one-half of the income to his daughter, the petitioner, for her life, and on her death leaving issue pay the principal to her children in equal shares on their attaining 21. Denied.

Wm. George Oppenheim, for petitioner; W. H. Pemberton, for executor.

COFFIN, S.—In the briefs submitted by the respective counsel there is no discussion of, nor are any authorities cited on, the jurisdictional question. All that appears on the subject is contained in that submitted by the executor's counsel, in which it

is claimed that "the surrogate cannot pass upon his transactions as to sale of real estate." The result of researches made by me touching the power of the surrogate on the subject are, briefly, as follows: By section 3, ch. 252, p. 283, of the Laws of 1822, it is provided that where, by any last will, a sale of real estate is authorized to be made either for the payment of debts or legacies, it shall be lawful for the surrogate to call the executors to account for the proceeds of such sales, and the distribution thereof, etc. (subsequently repealed). By section 57, tit. 4, ch. 6, pp. 109, 110, of the second part of the Revised Statutes, we find the same provision, except that it applies only to the case where, by any last will, a sale of real estate shall be ordered to be made. Section 75, ch. 460, p. 537, of the Laws of 1837, makes a similar provision in a case where the sale is made in pursuance of an authority given by any last will; and the proceeds of sale may be brought into the surrogate's office for distribution, and shall be distributed in the same manner, and upon like notice, as if they were proceeds paid into his office in pursuance of an order of sale of real estate for the payment of debts. The above section 57 of the Revised Statutes was repealed by subdivision 3, sec. 1, ch. 245, of the Laws of 1880, and the above section 75 by subdivision 14 of the same section; thus apparently leaving no provision for either case. But, in the same year, chapters 14 to 21, inclusive, of the Code of Civil Procedure, were enacted; and it is presumed that subdivision 6, section 2514, and sections 2802-2811, inclusive, were intended to supply the places of the above repealed sections. By a "supplement to part 3 of the proposed Revised Statutes," appended to the first report of the above chapters to the Legislature by the Commissioners of the Code, will be found a section unnumbered 46, as follows:

"Where real property is sold as prescribed in the last section [in pursuance of an authority given by any last will and testament] the proceeds thereof may be brought, for distribution, into the Surrogate's Court having jurisdiction. The surrogate must proceed to distribute the same upon notice, and he has

power to compel them to be brought in for that purpose. The executor or administrator selling the real property is deemed a testamentary trustee, within the provisions of title sixth of chapter eighteenth of part third of these Revised Statutes."

The commissioners' note to this section is this:

"Proposed as a substitute for Laws 1837, ch. 460, sec. 75 (4 Edm. St. 500), which confers upon the surrogate the power to distribute the proceeds. See *Stagg v. Jackson*, 1 N. Y. 206. We think that section 2319 [2514 of the present Code], subd. 6, pt. 3, of this revision, in connection with sections 2572-2580 [now being 2802-2811] of the present Code, sufficiently covers the subject; but we add the foregoing section for greater caution."

The legislature did not enact this section, thus concurring in the view that the sections above referred to "sufficiently covered the subject."

The conclusion is therefore reached that the executor, being a testamentary trustee, whose duties, as such, were separable from his duties as executor, is liable to account for the proceeds of sales made by him, in this court. By section 2743, which is made applicable to the accounting of a testamentary trustee by section 2811, the surrogate must decree payment and distribution. Thus, the powers of the court to decree payment and distribution, in a case like this, are the same as those conferred by the repealed section of the act of 1837. All the acts referred to empower the surrogate simply to distribute the proceeds of sales received by the executor, and he has power to charge the trustee with any proceeds of sale which he has omitted to charge himself with. He cannot inquire into the validity of any sales of real estate made by him by reason of fraud, and the like. The court is here asked, among other things, to pronounce a sale of a lot, made by the executor to his son, and by his son to the executor's wife, void for fraud. This the court has no power to do. Section 58 of the Revised Statutes, immediately following section 57, above referred to, declares that any executor or administrator or other person appointed as

therein directed, who shall fraudulently sell any real estate of his testator or intestate contrary to the foregoing provisions, shall forfeit double the value of the land sold, to be recovered by the person entitled to an estate of inheritance therein. This section was not repealed by the repealing act of 1880, and is still in force. See 4 Throop's Rev. St. (1889), p. 2568, sec. 58. It was proposed by the enactment of section 47 of the said supplement to extend the provisions thereof to the case of an executor vested by the will with authority to sell—the forfeiture to be recovered by an action, etc.; but for some reason it appears not to have received legislative sanction. It will be discovered that in none of these enactments proposed, repealed, or in force is any power conferred upon the surrogate to inquire into and determine any question as to an alleged fraudulent sale, and he cannot do it now unless he is clothed with it by some statute. The question belongs to a higher tribunal. Surrogate's Courts are creatures of the statute, and have a jurisdiction limited thereby. It cannot be discovered that they are clothed with authority by any express law, nor any power incidental thereto. All their powers on the accounting of a testamentary trustee are defined by sections 2743 and 2812. By the latter section, where a controversy arises respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, it must be determined in the same manner as other issues are determined by them. See *In re Rogers* (Surr.), 16 N. Y. Supp. 197. Here the jurisdiction of the surrogate, as to the questions he may try, ceases, and he cannot go beyond and try and determine any others. In the case of *Fulton v. Whitney*, 66 N. Y. 548, at page 557, the court says that all the surrogate could do was to settle the accounts of the trusts created by the will. This was after the passage of chapter 115 of the Laws of 1866, which act is substantially the same as section 2802 of the present edition of the Code, and was the first which authorized a testamentary trustee to render and settle his accounts before the surrogate. All that may be sought by the petitioner in this proceeding is the recovery of interest on her

share of the proceeds of real estate sold; and she has an undoubted right, as already remarked, to show, if she can, that the testamentary trustee has not accounted for all of such proceeds, and her share of the interest thereon. There is no controversy as to her right to so share. All of the objections taken to the evidence tending to show fraud in the sale of lands are sustained. The sole question that remains for determination, therefore, is the condition of the trustee's accounts.

The account of proceedings filed is very unsatisfactory, loose in structure, confusing and embarrassing. There are only two schedules—designed, the one to show all receipts; and the other, all disbursements, embracing legacies paid, funeral expenses, and other expenses of administration, etc. They are not added up, and no summary is furnished. Some of the dates of receipts of proceeds of sale are omitted, as are also any statement showing how and when investments were made, rate of interest, etc. There is no statement of the items of interest paid, or when, to Mrs. Burtis but the whole is given in a lump sum. Without enumerating other defects, these sufficiently show the careless manner in which the account was prepared. The petitioner is chiefly interested in ascertaining the amount of the proceeds of sales on which she is entitled to one-half the interest. According to the account—

The amount is	\$72,703 25
To which is to be added proceeds of sale to Fraser, conceded to have been omitted	500 00
	<hr/>
	\$73,203 25
To this is added one-half interest received.....	1,361 82
	<hr/>
	\$74,565 07
From which the trustee claims should be deducted, including interest paid to Mrs. Burtis, and excluding charge for service of attorney herein	19,000.02
	<hr/>
Balance	\$55,565 05

On which the petitioner, it is conceded, is entitled to one-half the interest, less expenses of this accounting and commissions.

As the proceeds of the sale of the Halfway House were intended to pay the legacy of \$500 and interest to the wife of the trustee, and as she was not entitled to interest, which amounted to \$90, and with the payment of which he credits himself, there can be no ground of complaint, as he charges himself with \$600; being \$10 more than he credits himself with. The item of credit of \$75 for interest on legacy to George B. Valentine must be disallowed, as the testator made it payable without interest. The trustee credits himself with some items in contempt proceedings in the Supreme or County Court. These proceedings appear to have been against him for some neglect of duty. These items, amounting, as nearly as can be ascertained, to \$36.50, are disallowed. Adding these items to the above balance, makes it \$55,676.55. It does not seem to be controverted that the petitioner has received \$1,361.82 for interest moneys on her share. There is no evidence furnished, or data given, whereby the court can adjudge as to the correctness of that amount; but it is assumed to be all that her fund earned down to October 20, 1891, with the possible exception of the interest on \$111.50—the sum of the items above disallowed. If the trustee has failed to produce proper vouchers for any of the credits claimed by him, he is still at liberty so to do. If he fail to do so, or furnish the evidence of payment thereof, as provided by section 2734 of the Code, they will be disallowed, and the fund in his hands increased accordingly. On the settlement of the decree, counsel can be heard as to any matter which may have been overlooked, and as to any other matter to which attention may be called.

In re CARVER'S WILL.

(3 Misc. 567.)

*(Surrogate's Court, Cattaraugus County, Filed May 10, 1893.)***1. WILLS—PRESUMPTIONS AS TO ALTERATIONS.**

Where alterations appear on the face of a testamentary disposition of property, such alterations are presumed to have been made after execution, rendering it necessary for those seeking to establish a will containing such apparent defects to overcome such presumption by proof, direct or inferential. This is an exception to the general rule as to other instruments, which provides that such alterations, in the absence of proof to the contrary, are presumed to have been made before the execution of the writing in which they appear.

2. SAME—EFFECT OF ALTERATIONS.

Although as a general rule a material alteration in written documents, made after execution, for fraudulent purposes, vitiates the entire instrument, the effect of an unauthorized and unauthenticated alteration in a will, made after execution, is to render the change inoperative, leaving the will to stand in form and effect as before such alteration was attempted.

3. SAME—ALTERATIONS—WHEN MADE BEFORE EXECUTION.

A testator bequeathed to his wife \$400 annually out of his personal estate, also all his household furniture, goods, books, pictures, organ, clothing, etc., to be accepted in lieu of dower. It was claimed that the words "to be accepted in lieu of dower" were fraudulently inserted after execution. *Held*, that as the words "clothing, etc., to be accepted in lieu of dower" were written upon and constituted one entire line in regular order, and were not crowded, and the only person to be prejudiced by such words, viz., the widow, urged probate of the will as it stood, and the family physician, who had witnessed the will, and carefully examined it at the time of execution, testified he observed no alteration therein, the words in question were not inserted after execution, although the letters in such words were somewhat heavier and of a darker shade than most of the other parts of the will, but not of particular portions thereof.

4. WILLS—TESTAMENTARY CAPACITY.

When both witnesses to a will, one the family physician of many years standing, and the other an old neighbor and intimate acquaintance of decedent, who nursed him in his last illness. testify that dece-

dent was of sound mind at the time he made his will, and the circumstances attending the execution of the will confirm such conclusions, *held*, that testator at the time of making his will was fully competent to do so, although of advanced age, and in his last illness, and some of the contestant heirs-at-law and next of kin took very little, and others nothing, under the will.

5. SAME—UNDUE INFLUENCE.

Proponent, a lawyer, who, although a relative of decedent was not an heir or next of kin, and who had transacted some legal business for decedent, drew his will and was the principal beneficiary thereunder. *Held*, that the burden thereby thrown upon proponent of showing that the will correctly represented decedent's wishes was met by the fact that for more than a year previously the testator had the general scheme of the will, as drawn, in mind; that the drawing of the will originated with testator, and not with proponent, who merely, testator being dangerously ill, acted as scrivener when requested to do so by testator; that testator had previously consulted with his wife, and that testator was surrounded by friends during the entire time of the visit of proponent, so that latter had not the opportunity to unduly influence testator.

Probate of will of Solander Carver, deceased. Granted.

C. Z. Lincoln, for proponent and widow; T. H. Dowd and Alfred Spring, for contestants; J. J. Inman, special guardian, appeared in person.

DAVIE, S.—This is a proceeding to secure probate of the instrument propounded as the last will and testament of the deceased, such probate being opposed upon the grounds of alleged fraudulent alteration, undue influence, and lack of testamentary capacity.

Solander Carver died at the town of Great Valley, in the County of Cattaraugus, on the 14th day of February, 1893, at the age of 69 years, leaving him surviving his widow, Rebecca Carver, one sister, several nephews and nieces, but no children or lineal descendants, and possessed of real estate of the value of about \$7,000, and personal property to the amount of \$14,000. The instrument presented for probate herein bears date on the 9th day of February, 1893, and by its terms be-

queaths to the widow all of testator's household furniture and an annuity of \$400 during life. It gives to each of the sons and daughters of a deceased sister of testator small legacies in money; bequeathes to Viola A. Bailey, another niece, an interest in a certain real estate mortgage known as the "Niles mortgage;" and devises the real estate to the proponent, and gives to him the residuum of the estate after payment of such legacies and the death of the annuitant. The proponent and the legatee Bailey are children of the only living sister of deceased; the contestants William Scoby and Jennie Norton are children of a deceased sister of the testator; and the minors, who appear herein as contestants by their special guardian, are grandchildren of said deceased sister.

A methodical analysis of the objections urged against probate herein, and of the facts and circumstances upon which the same are predicated, leads us first to an examination of the claim of fraudulent alteration. Questions of this character have been before the courts so frequently that there need be but little difficulty in determining the general legal principles applicable thereto, and in passing it will be observed that more marked distinctions exist between alterations, erasures and interlineations appearing from inspection of wills than any other class of legal documents. As a general rule such alterations, in the absence of proof to the contrary, are presumed to have been made before the execution of the writing in which they appear. Such presumption seems to have had its origin in the fact that material alterations modifying or defeating vested rights under written documents are usually the outgrowth of a criminal intent, the existence of which the law does not willingly presume, always preferring the presumption of innocence to that of guilt; but an exception to such rule exists in case of wills, which from their very nature cannot become operative or vest any rights, and which are absolutely subject to the volition of the testator, to the time of his demise, and where the necessity for the presumption above referred to does not exist. The generally recognized rule is that, where alterations appear upon the face of a

testamentary disposition of property, such alterations are presumed to have been made after execution, rendering it necessary for those seeking to establish a will containing such apparent defects to overcome such presumption by proof, direct or inferential. *Wetmore v. Carryl*, 5 Redf. Sur. 544; *Dyer v. Erving*, 2 Dem. Sur. 160. The Court of Appeals, in a somewhat recent case bearing upon this subject, says that, "where an interlineation, fair on the face of the instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after execution" (*Crossman v. Crossman*, 95 N. Y. 145-152); but in that case the application of the principle there enunciated was limited to wills where the interlineation was fair upon its face; for the court says that, if there are any suspicious or doubtful circumstances growing out of the mode of alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances pertaining thereto become questions of fact for the consideration of the trial court in determining whether such alteration was made before or after execution.

The second point of variance between wills and other instruments containing alterations is the effect thereof upon the validity of the instrument containing them. It is the general rule that a material alteration in written documents, made after execution, for fraudulent purposes, vitiates the entire instrument. Such, however, is not ordinarily the case with wills. The effect of an unauthorized and unauthenticated erasure or interlineation in a will, made after execution, is to render the change thereby sought to be made inoperative, leaving the will to stand in form and effect as before such alteration was attempted. The reason for such a rule in case of wills is apparent. The statute has surrounded the execution of testamentary instruments with certain reasonable forms and ceremonies as a shield and protection against fraud and imposition, and the purpose of such precautionary measures might be entirely defeated if held applicable only to the original execution, leaving all subsequent alter-

ations and modifications, however important, to be made without such protection.

The first item of the will in this case is as follows:

"First. After all my lawful debts are paid and discharged, I give and bequeath unto my beloved wife, Rebecca Carver, out of the avails of my personal estate, the sum of four hundred dollars annually, to be paid to her on demand by executor during her life. I also bequeath to my said wife all of my household furniture, goods, books, pictures, organ, clothing, etc., to be accepted in lieu of dower."

It is asserted by the contestants that the words "to be accepted in lieu of dower" were inserted after the execution of the will. This allegation presents a question of considerable importance, and one worthy of careful consideration, for the legal effect of the words claimed to have been added is to very materially diminish the value of the widow's interest in the estate of the deceased. If it appears with reasonable certainty from an inspection of the instrument that such words were not written at the same time as the other portions of the will, then the presumption is that they were inserted after execution, because in this case the alteration does operate in favor of the party holding the instrument, and it becomes his duty to show sufficient facts to overcome such presumption. This will is written upon the usual printed blank with ruled lines, and all thereof except the signatures of the testator and attesting witnesses was in the handwriting of the proponent. The words, "clothing, etc., to be accepted in lieu of dower," are written upon and constitute one entire line in regular order,—no crowding of words or letters, and no alterations, erasures or interlineations, or other peculiarities observable from inspection, except that the letters in the words "to be accepted in lieu of dower" are somewhat heavier, and of a slightly darker shade, than the letters in most of the other portions of said instrument, but no darker and but little heavier than the word "fifth," at the beginning of the fifth item of said will, and neither darker nor heavier than the letter "S" in the name of the deceased at the beginning of the

will. It will be entirely apparent to any one who will carefully compare the words claimed to have been inserted with various other portions of the will that such words were written with the same ink, and that their apparent darker hue is occasioned simply by a freer flow from the pen, and consequently a greater accumulation of ink at that point. It is the experience of every scrivener that irregularities in the general appearance of written documents, a diversity in the form and shading of the letters, is not only possible, but of very frequent occurrence in writings by the same person, at the same time, and with the same pen and ink, and that such is especially liable to be the case where the scrivener writes from dictation, with his attention divided between the mental operation of comprehending and formulating the instructions of the person dictating and the physical operation of placing the same upon the paper. There are other significant suggestions in this connection. The attesting witness Colgrove had been for many years the family physician of the deceased; was present at the time of the execution of the will; not only signed it as a witness, but saw the testator sign it; and on that occasion examined the will with considerable care, so much so that he observed and recollected the blot over the S in the name of the deceased at the beginning of the will; and upon the trial he is shown the will, and asked to examine it, which he does, and is then questioned with considerable particularity regarding its appearance, and he testifies distinctly that he observes no changes or alterations therein. Then, again, the widow—who is the only one prejudiced to any extent by the words claimed to have been inserted—was present with the deceased while the will was being prepared, and knew the wishes and desires of deceased in regard to the disposition of his property, and who is in a situation to know, and does beyond any question or peradventure know, whether this instrument is in the same situation now as when executed by deceased—appears in this case not as a contestant, but, with the proponent, urging probate of said will in its present form. She is a woman of good judgment and fair ability,

and the suggestion is farcical that she would knowingly and quietly submit to the consummation of a fraudulent scheme perverting the testamentary wishes of her deceased husband, and depriving her of valuable property rights. The only reasonable inference to be drawn from the relations of the widow to this contest is that she distinctly knows and understands what the wishes of the deceased were in regard to the contents of his will, and that she respects such wish, and governs her conduct so as to effectuate the same. In view of all these facts, I have found as a fact in this case that the instrument presented for probate is in the same condition now as when signed and executed by the testator on the 9th of February, 1893.

The second proposition in this case is that of alleged lack of testamentary capacity. The law does not, of course, attempt to define any particular grade of mental ability or acumen necessary to qualify one to make a will. Wills are made by all classes of people, in every station of life, and under almost every conceivable set of circumstances; by persons of weak intellect, and by those of magnificent ability; sometimes in the midst of life and business prosperity, at other times in *extremis*, or while overwhelmed with adversity. Hence it is impossible to formulate any precise rules applicable to any particular case. The most that the courts have attempted to do was to dispose of each individual case as it arises, upon its own peculiar facts and circumstances, and in so doing establish certain very general propositions bearing upon this subject. It has been asserted that in law the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was *compos mentis* or *non compos mentis*, as these terms are used in their fixed legal meaning; and if *compos mentis*, he can make any will, however complicated; and, if *non compos mentis*, he can make no will, however simple. *Delafield v. Parish*, 25 N. Y. 9. Again, it has been asserted as a general proposition that one capable of comprehending the condition of his property, and his relations to those who are the natural objects of his bounty, and able to collect and retain in his mind without

prompting the elements of his business, possesses testamentary capacity. *Van Guysling v. Van Kuren*, 35 N. Y. 70. And, further, that no presumption of lack of testamentary capacity springs from the fact that the terms of the will are harsh and unjust, and that the natural objects of testator's bounty get less under the will than in case of his death intestate. *In re Tracy*, 11 N. Y. St. Rep. 103. And that there is no presumption against the validity of a will because made by a person of advanced age; nor can incapacity to make a will be inferred from an enfeebled condition of body or mind. *Horn v. Pullman*, 72 N. Y. 269. In the light of these and various kindred authorities, an examination of the evidence in this case discloses but little to sustain, but very much to refute, the claim of want of capacity. The attesting witness Colgrove, who evidently testifies in this case without prejudice or bias, was a physician of many years' practice. He had been the family physician of the deceased for many years, covering the time of the sickness and death of testator's only child. He visited deceased daily during his last illness, closely watched the progress of his disease, conversed with him frequently, and from his long acquaintance with and personal attendance upon deceased was peculiarly well qualified to speak as to his mental condition at the time of the execution of this will. He declares under oath, positively and distinctly, that the testator was then possessed of sound mind and understanding. Nor does he give a mere formal, inconsiderate expression of opinion upon this subject, but he is subjected to more than a usually lengthy and rigid cross-examination without in the least discrediting his evidence, but, on the contrary, disclosing many facts and circumstances showing the correctness of his opinion. The other attesting witness, Davis, had been for a long time a neighbor and intimate acquaintance of the deceased, had had business transactions with him, nursed and cared for him in his last sickness, and had ample opportunity to observe any loss of memory or failing of mental capacity on his part; and he also distinctly testifies that at the time of the execution of this will deceased was of sound

and disposing mind and memory. The correctness of these conclusions find most satisfactory confirmation by a slight reference to the circumstances attending the execution of this will as disclosed by the evidence. Deceased had been for many years prior to his death somewhat actively engaged in business. He was a hard-working, industrious man, strictly temperate, possessed of sound judgment and practical common sense, not inclined to be communicative in relation to his business affairs, but, on the contrary, of a secretive disposition, and up to the time of his last illness had been a man of unusually good health, aside from occasional slight attacks of rheumatism and acute inflammation of the bladder, and at no time had he been afflicted with any physical or mental disorder tending in the least to impairment of his mental faculties. His final sickness began on the 7th day of February, 1893, and the instrument now propounded for probate was executed within two days thereafter, and at no time prior to the execution of the same did his conduct or conversation indicate any incoherence, loss of memory, or weakness of understanding. Although not talking freely, what he did say was in all respects rational, consistent and intelligible. Directly before the preparation of the will he conversed with the physician regarding his condition; spoke of his plans and intentions regarding the making of a will, and explained why he had delayed it to that time; asked the physician if he could then draw a will for him; desired an opportunity of discussing his business affairs with his wife, and did so, and, after his interview with her, again talked with the physician, and informed him that he was going to make a will, and that his wife desired to be pensioned, as he expressed it, and requested the physician to stay and witness his will when drawn; selected his nurse, Mr. Davis, as the other attesting witness; expressed his approval of the form of the will after it was prepared by saying that it was as he wanted it, and signed it plainly and distinctly, and thereupon declared it to be his last will and testament, and again requested the witnesses to sign it. In view of all these facts and circumstances, concerning which

there is no dispute in the testimony, the conclusion seems irresistible that the testator at the time of executing this will was in all respects fully competent so to do.

The remaining question is that of the charge of undue influence exercised upon deceased by the proponent at the time of the preparation of the will. Having determined that the testator at the time of the execution of this will was of sound mind, fully competent to transact business, capable of comprehending the extent of his property and his relations to those around him, it follows as a corollary thereto and a natural deduction therefrom that the making of the will in the form it now presents was the free, untrammelled act of the testator himself. The cases have quite clearly defined the grade and character of the influence which must be shown to have been exercised upon the testator to justify denying probate to a will. In order to avoid a will upon any such ground it must appear that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which by importunity that could not be resisted constrained the testator to do that which was against his free will and desire, but which he was unable to refuse, or too weak to resist. It must not be the promptings of affection, the desire to gratify the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts or friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear. *Society v. Loveridge*, 70 N. Y. 387-394; *Gardner v. Gardner*, 34 N. Y. 155; *Marx v. McGlynn*, 88 N. Y. 357; *Seguine v. Seguine*, 4 Abb. Dec. 191; *Dean v. Negley*, 41 Pa. St. 312. The exercise of such undue influence must be proved, and, while it is not necessary, and ordinarily not possible, to establish it by direct proof, the circumstances relied upon as inferentially showing the same must be of such a character as to naturally lead to the conclusion that such influence had in fact been exerted. *Brick v. Brick*, 66 N. Y. 144. It is not sufficient to

show that a party benefited by a will had the motive and the opportunity to exert such influence. There must be evidence that he did exert it. *Cudney v. Cudney*, 68 N. Y. 149; *In re Williams* (Sup.), 19 N. Y. Supp. 778. In this case the will was drawn by the proponent, who is named as a legatee therein and executor thereof, and this circumstance is urged with great earnestness by the contestants as proof of undue influence on the part of the proponent. It is undoubtedly true that the law looks with a jealous eye upon the acts of one who, standing in a relation of trust or confidence, is instrumental to any extent in procuring a testamentary provision in his own favor; and, while such circumstance does not in and of itself invalidate the bequest, it does call for satisfactory explanation, and imposes upon him claiming under such provision the burden of showing that it was in all respects fair and honest. The only relation which proponent sustained to the testator of a confidential character at the time of preparing the will was simply that of scrivener. The proponent was an attorney, and at some former time had transacted some little legal business for the testator by way of drawing bonds, mortgages and other papers; but it does not appear that at the time the will was drawn the relation of attorney and client existed between testator and proponent to any extent. If the emergency of the case would have permitted doing so, it would undoubtedly have displayed much better judgment and sense of propriety on part of proponent to have procured the assistance of another attorney in preparing this will; but the fact that he failed to do so does not invalidate the legacy to him. It has been distinctly held that the fact that the draughtsman who drew the will takes a legacy under it is only a circumstance to be considered in connection with other circumstances indicative of fraud or undue influence. *Post v. Mason*, 91 N. Y. 539; *Coffin v. Coffin*, 23 N. Y. 9. It has also been held that where a will was drawn by the principal beneficiary under it, and the testator was able to read writing, and of sufficient capacity to transact business, and yet did not read it, it may be inferred from the circumstances that the testator

was acquainted with its contents. *Nexsen v. Nexsen*, 3 Abb. Dec. 360; *In re Smith*, 95 N. Y. 516. In the case last cited, it was held that the fact that the attorney of the deceased was the principal beneficiary under the will does not alone create a presumption that the testamentary gift was procured by fraud or undue influence, but that in a case where the testator was of advanced years, infirm mentally and physically, and made his attorney his principal beneficiary, contrary to previously expressed testamentary intentions, and where such attorney was the draughtsman of the will, and took an active part in procuring its execution, and that the testator acted without independent advice, the burden is imposed upon the attorney of showing that the will was the free and untrammelled expression of the testator's intentions.

So I think it may be said that the general principle adduced from these various authorities applicable to this case is that under the peculiar circumstances attending the making of this will, the burden was imposed upon the proponent of showing that the will, in its present form, correctly represents the wishes of the deceased; and it is urged on part of the contestants that the evidence bearing upon that question falls short of meeting this requirement, and that it fails to show that the testator was fully apprised of the contents of the will before executing it. This charge necessitates an examination somewhat carefully of the facts attending such execution. Deceased was taken sick February 9, 1893. His physician was called, and visited him at the hour of 4 P. M. of that day, and found him in bed, troubled with a recurrence of his former ailment—inflammation of the bladder—and with an inflammation of the lungs. The physician visited deceased on the following day (Wednesday), and discovered that the inflammation of the lungs was extending, and had assumed the form of pneumonia. He visited him again on Thursday—the day the will was drawn—about noon, examined him carefully, and concluded that his recovery was a matter of serious doubt. He then talked with the deceased about his condition, and informed him that he was very sick,

but expressed to him the hope that he would recover; and then suggested to him that, if his business affairs were not satisfactorily arranged, he should then attend to them. Deceased replied that he had been thinking for four years of making a will, but that he had supposed that if a man made his will he would die soon after, and that he had put it off; that he intended in the fall to buy a house and lot in the village of Salamanca, and move there, and then make his will, but that he wanted his will made then, and that there was no one present who could draw it unless the physician would do so, to which the physician replied that he could draw his will, but that Mr. Wheaton was in the adjoining room, and he could do it much better. Deceased said he had not thought of that, and asked the physician to stay and witness his will when drawn, and to tell his wife to come into the room, saying he wanted to talk over his business matters with her. This request was communicated to the wife, and she thereupon went into the room with the testator, and closed the door, and remained alone with him for about one hour, and at the end of that time came out of the room, and informed the physician that testator again desired to see him. The physician accordingly went into the room where testator was, and again talked with him about his condition, and testator said to him: "I want you to have Stanley (Mr. Wheaton) make my will. Rebecca says she wants to be 'pensioned,' " and was thereupon evidently about to inform the physician what disposition he designed to make of his estate, when the physician told him he did not want to know anything about how he wanted his will drawn, and thereupon testator requested that Mr. Wheaton and his wife, Rebecca, come into the room, which they did, and remained with him for about one hour and a half, during which time the will was drawn. At the end of that time Wheaton opened the door and called the physician and the other attesting witness into the room, and said to them in the immediate presence and hearing of testator that he had drawn his will, and that he had read it over to him, and then asked the testator if there was anything he wished to change, to which testator re-

plied that it was as he wanted it. Thereupon testator took the pen, signed the will, acknowledged it to be his last will and testament, and requested the witnesses to sign it, which they did in his presence, and in the presence of each other. When the witnesses were called into the room the deceased was reclining in bed at an angle of about 45 degrees, with the will in front of him upon a book, and with full and ample opportunity of examining its contents. The proponent resided at the town of Little Valley, about 15 miles distant from the residence of the testator, and after the physician's visit on Wednesday he communicated with Wheaton, who thereupon went to the residence of deceased, arriving at the hour of midnight, and stayed there until after the execution of the will, and substantially all the time to the death of the testator. At the time of Wheaton's arrival one Mr. Eider was in charge of the testator, nursing and taking care of him, and he testifies that when Wheaton came he spoke to the testator, asking him how he felt, but that nothing whatever was said between them upon the subject of a will or other business affairs, and that he remained with the testator continuously to the time of the arrival of Mr. Davis, the other nurse, in the morning. Davis testifies that he was constantly in charge of testator from the time he arrived there until the physician came, about noon; that he was not out of the room, except momentarily, for the purpose of doing errands or transacting other matters of business, and that at no time in his presence did Wheaton and testator have any conversation in reference to the making of a will. Moreover, it distinctly appears from the evidence that the testator had not only been contemplating the making of a will for a long time, but that he had determined upon a general scheme or plan for the distribution of his property; that such plan involved the giving to his wife of an annuity during her life, and the making of Wheaton his principal beneficiary. In the summer or fall of 1892, the deceased, in speaking of testamentary wishes, said to his wife, in the presence of Miss Finney, a domestic, that he was going to give his wife \$400 a year and a house and lot in town if he had one. In November, 1891,

in speaking about his property matters to the witness Bailey, testator said that he was going to make a will, and was going to will the farm to Wheaton, and that Rebecca wanted \$400 a year for her share; that she did not want to be bothered with the farm; and that he was going to give the Niles mortgage to Viola Bailey. Again, in November, 1892, he said to the same witness, Bailey, that he must make a will; that he was going to give the farm to Stanley, and that Rebecca had got to be paid \$400 pension; and that the interest in the Niles mortgage he was going to give to Viola Bailey; that the Scobys had done something he did not like, and he would not give them any property. This I believe to be a full and fair statement of the general facts attending and leading up to the execution of the will in question, and the conclusions directly established thereby, or reasonably and naturally inferable therefrom, are these: First, that for more than a year prior to his death testator had entertained a general scheme for the disposition of his property, the leading features of which were to "pension" his wife, and make the proponent his principal beneficiary after so providing for her; second, that the will as presented is in substantial compliance with such scheme or design; third, that the proposition for making a will at the time this will was drawn did not originate with the proponent, but with the testator himself, after learning from his physician the serious nature of his illness; fourth, that the proponent did not volunteer his services as scrivener, but acted in that capacity only after having been requested by the testator so to do; fifth, that such will was not prepared until the testator and his wife had consulted together in relation thereto; sixth, that the widow was present during the time such will was being prepared, and knew the desires and wishes of deceased, and has full knowledge at the present time as to whether the will is now in the same form as when executed, and whether it correctly represents the testamentary desires of deceased; seventh, that deceased was surrounded by friends and attendants during the entire time that proponent was there, and that the opportunity

did not exist for the exercise of any undue influence by proponent. After having carefully examined the elaborate briefs presented by the contestants in this case, and the various authorities to which my attention has been called, I am of the opinion that the conclusions above formulated are irresistible, and, such being the case, it becomes my duty to admit the will to probate. A decree will be accordingly entered.

(Note as to alterations in wills:)

GENERAL OBSERVATION.—WHEN ALTERATIONS DEEMED TO BE MADE (a) BEFORE EXECUTION, (b) AFTER EXECUTION.—BURDEN OF PROOF.—NOTING OF INTERLINEATIONS.—WHERE PROBATE OF WHOLE INSTRUMENT REJECTED.

GENERAL OBSERVATION.

The leading case upon this subject is *Crossman v. Crossman*, 95 N. Y. 145. In that case testator had executed his will in duplicate; one only of the instruments was presented for probate. In the other, there was an interlineation of the name of one of the executors which apparently had been left out in copying, and the interlineation was noted at the bottom of the instrument before the attestation clause, and it was *held* that there was no presumption that the interlineation was fraudulently made after execution, and further, that where an interlineation is fair upon its face, and it is entirely unexplained, there being no circumstances whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there were any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court, in deciding whether the alterations were made before execution or not.

WHEN ALTERATIONS DEEMED TO BE MADE BEFORE EXECUTION.

A testator had two sons and three daughters, and by his will

he devised one-fifth of his estate to each of them successively, but in the clause making such provision for one of his daughters her name was interlined. The entire will, including the interlineation, was in testator's handwriting, the whole appearing to have been written at the same time, with the same pen and ink. There was no note of the interlineation in the instrument. *Held*, that as the interlineation was fair upon the face of the will, and rendered effective a part of his will containing only provision for one of his children, it was made before execution. (Matter of Voorhees, 13 St. Rep. 183, 6 Dem. 162.)

When a will is found carefully preserved among the testatrix's papers, and it appeared that her signature had been erased by drawing diagonal lines over the name and then nearly erasing such lines and the signature, and that the will now bore testatrix's genuine signature, carefully rewritten over the original signature, which was written with a different ink from that used in the body of the will or by the witnesses, *held*, that as the evidence showed that the testatrix might have used different ink from that used by the witnesses, and as the burden of proof was upon contestants to show that the erasure and subsequent signature were made subsequent to the execution of the will, the court could not (following the rule that when an interlineation or erasure is fair upon its face and entirely unexplained, there is no presumption in the absence of any suspicious circumstances that it was fraudulently made after the execution of the instrument) presume as matter of law that the erasure was made at some time subsequent to the execution of the will. (Matter of Wood, 32 St. Rep. 286, 2 Connolly, 144, 11 N. Y. Supp. 157.)

When the bottom of the first page of a will was cut off, but not so as to destroy its continuity, and the paper was folded in such a manner that neither of the subscribing witnesses could swear that the paper presented for probate had been mutilated or changed in any way since its execution, and it was found among decedent's private papers in its present condition, and it does not appear to have been disturbed until so found, there is no presumption that it was mutilated after execution. (Matter of Homes, 32 St. Rep. 902.)

When the testatrix was her own scrivener, and the custodian of the will, interlineations shown to be in her handwriting and erasures will be presumed to have been made by her prior to execution. (Matter of Potter, 33 St. Rep. 936, 12 N. Y. Supp. 105.)

The scheme of a will was to divide testator's estate into 100 parts; the persons who were to receive these shares appeared in the running writing of the will, but the *pro rata* of shares to be allotted to each of the beneficiaries was originally left blank. There appeared in the will, when offered for probate, pencil writing in some of the blanks superimposed over other pencil writings which had been either wholly or partially erased, and in other instances ink writings, different from the body of the instrument in the material employed, appeared over pencil writings wholly or partially obliterated. The contestants claimed that the burden rested on proponent to explain these erasures and obliterations, and satisfy the court by competent evidence that the will as it then appeared was in that condition when executed, otherwise the will should be recorded in blank. *Held*, that the rule relied on by contestants in regard to the presumption as to when interlineations or alterations of a suspicious nature appearing in a will were made, had no application to the case—that there is no statutory or legal requirement that a will shall be drawn on a particular kind of paper, nor with the same ink, nor exclusively in ink, nor all at one time; and there is no presumption that blank spaces left for the insertion of names or amounts in a will were filled in after execution; and *held* further, that the will should be admitted to probate and recorded, with the spaces filled in in lead pencil in blank, and as to the blank spaces which appeared filled in in ink, that same should be recorded as they appeared in the will, the difference in character of such writing, and of that in the body of the will, affording no ground for saying that such writing was inserted in the will after execution. (Matter of Tighe, 24 Misc. 459, 53 N. Y. Supp. [87 St. Rep.] 718.)

A handwriting expert testified that the first and second pages of a will were written on a half sheet of paper, larger and of a different milling from the rest of the will, and were in a running hand, which spread much more than the writing of the following pages, which was an engrossing backhand, changing to a running hand toward the last, and that the words "two thousand" in a clause giving an annuity of that amount in dollars to testatrix's granddaughter, were written over an erasure made with chemicals. *Held*, that these peculiarities rendered it incumbent upon proponents to satisfactorily explain same, and *held* further, that as the attorney who drew the will testified that he used a prior will as a draft in the preparation of

same, and the prior will with pencilled alterations therein, corresponded with the later will, the first and second pages of which were exactly similar to the former will, and as the attorney had no motive for altering the will after execution, it was exceedingly improbable that the will had been tampered with since its execution, and the peculiarities existing therein were sufficiently explained. (Matter of Dwyer, 29 Misc. 382.)

WHEN ALTERATIONS DEEMED TO BE MADE AFTER EXECUTION.

After a will had been duly executed, certain alterations were attempted to be made by testator by writing in the will, erasing and interlining. *Held*, that the will as originally executed should be upheld. (Quinn v. Quinn, 1 T. & C. 437—citing Jackson v. Holloway, 7 Johns. 394, and McPherson v. Clark, 3 Brad. 92.)

To the same effect is matter of Prescott, 4 Redf. 178.

In Dyer v. Erving, 2 Dem. 160, it was held, following Wetmore v. Carryl, 5 Redf. 544, that in the absence of evidence to the contrary unattested alterations upon the face of a will must be presumed to have been made after its execution.

Material alterations in a will are not presumed to have been made before the execution thereof, where no explanation of the erasures is given, and where suspicion arises upon the face of the paper, and from surrounding circumstances, and it is doubtful if the erasures were made before the execution of the paper. (Herrick v. Malin, 22 Wend. 388; Smith v. McGowan, 3 Barb. 404; Acker v. Ledyard, 8 id. 514.)

After executing her will, testatrix stated to the scrivener she wished to make further bequests. Instead of preparing and having executed a codicil, the scrivener wrote testatrix's directions on a slip of paper, which he subsequently pasted upon the will, the latter having been cut into, so as to permit the clause to be inserted in its proper place as the seventh subdivision of the will. There was no republication of the will after that clause had been written. *Held*, that the will should be admitted to probate, excluding the inserted clause. (Stevens v. Stevens, 6 Dem. 262.)

An interlineation, erasure, or other alteration made in a will, either by the testator or a stranger, after due execution of the instrument, without a new attestation, does not avoid the instrument, but the court may disregard the same and probate the

will according to its original language, when that can be ascertained. (Matter of Wilcox, 46 St. Rep. 877, 30 N. Y. Supp. 131—citing *Doane v. Hadlock*, 42 Maine, 72; *Smith v. Fenner*, 1 Gale [U. S. C. C.], 170; *Will of Tonnele*, 5 N. Y. L. O. 254; *Pringle v. McPherson*, 2 Brevard [S. C.], 279; *Stover v. Kendall*, 1 Coldw. [Tenn.] 557; *Wheeler v. Bent*, 7 Pick. 61; *Penniman Will case*, 20 Minn. 245; *Wolf v. Bollinger*, 62 Ill. 368; *Locks v. James*, 11 M. & W. 901; *Short v. Smyth*, 4 East, 418; *In re Harny*, 30 L. J. Prob. 142; *Cooper v. Bockett*, 4 Moore, P. C. 419; *McPherson v. Clark*, 3 Brad. 92; *Matter of Prescott*, 4 Redf. 178; *Wetmore v. Carryl*, 5 id. 544-553; *Dyer v. Irving*, 2 Dem. 160-183; *Will of Wood*, 32 St. Rep. 286; *Quinn v. Quinn*, 1 T. & C. 437; *Lovell v. Quitman*, 25 Hun, 537.)

BURDEN OF PROOF.

Material alterations or erasures in a will are not presumed to have been made before the execution thereof where no explanation of the erasures is given, and where suspicion arises upon the face of the paper and other surrounding circumstances, and it is doubtful if the erasures were made before the execution of the paper. In such case the propounder of the instrument must make the doubt clear. (Matter of Barber, 72 St. Rep. 771.)

NOTING OF INTERLINEATIONS, ETC.

Interlineations in a will need not be noted at the foot of the instrument, provided that the place where it should appear is made before the execution and publication of the will. (Matter of Whitney, 70 St. Rep. 259, 90 Hun, 138—citing *In re Voorhees*, 6 Dem. Sur. 162; *Crossman v. Crossman*, 95 N. Y. 145, 153; *Tonnele v. Hall*, 4 N. Y. 140.)

An interlineation may be made in a will, as in any other instrument, provided that the place where it should appear is designated by the instrument with sufficient certainty. A will was written on a blank form. The first and second clauses filled up the blank space in the will, and at the end of such space were the words, "See annexed sheet." The third and fourth clauses were written on a separate sheet, fastened by metal staples to the face of the will at a point near the end of the second clause. *Held*, that the interlineation or attached paper, by the terms of the instrument itself, was to come in and

be made a part of the will before the formal ending thereof. (Matter of Whitney, 70 St. Rep. 259.)

WHEN PROBATE OF WHOLE INSTRUMENT REJECTED.

In doubtful cases, where material provisions in a will have been erased or altered, and the court cannot determine from the proof whether the alterations were made before or after execution, probate must be refused, and the whole instrument rejected. (Matter of Barber, 72 St. Rep. 771.)

In re SAUNDERS' ESTATE.

(Surrogate's Court, Cattaraugus County, Filed June 12, 1893.)

1. EXECUTORS AND ADMINISTRATORS—NEGLIGENCE—PERSONAL LIABILITY.

When an invalid claim is presented to an administrator, and he, although doubting its validity, yet willing to have it in some manner made binding upon the estate, agreed to refer it, but neglected to employ counsel to protect the estate before the referee, neglected to oppose the confirmation of the report allowing the claim, failed to appeal from the judgment thereon, or adopt any other measures to relieve the estate therefrom, he is guilty of such negligence as to render him liable personally, and contestants will not be driven to the expedient of moving to set the judgment aside.

2. SAME—INTEREST ON USE OF PROPERTY.

An administrator will be charged with the value of the use of personal property, consisting of farming stock and implements of husbandry, of which he had the avails between decedent's death and the sale thereof.

3. SAME—INTEREST ON UNINVESTED MONEYS.

An administrator will be charged with interest on moneys of the estate which he might have invested, after allowing him a reasonable length of time (six months) in which to invest it.

4. SAME—INTEREST UPON PERSONAL CLAIM.

An administrator is entitled to interest upon a claim due to himself, although he received funds sufficient to defray same, as he is without authority to retain his own debt till allowed to him by the surrogate upon his accounting.

5. SAME—PROOF OF PERSONAL CLAIM.

Existence of an alleged claim due to an administrator must be established by legal evidence. Mere presentation thereof with an affidavit of verification is not sufficient.

6. SAME.

When an account filed and verified by an administrator claiming a debt due to himself, concedes payments to substantially the full amount of the claim as established, such payments will be set off as against the amount so established, and will not be applied upon that portion of the account which the executor fails to establish.

Judicial settlement of administrator's accounts, and proof of a personal claim due him.

N. M. Allen, for administrator; J. M. Congdon, for contestants.

DAVIE, S.—David Saunders died, intestate, at the town of Perrysburg, Cattaraugus County, March 2, 1891, and letters of administration upon his estate were issued to William Saunders, a son, on the 12th day of the same month. The administrator now presents his accounts for judicial settlement, and also seeks to establish a personal claim against the estate. Various items of the account, as well as a portion of such personal claim, are contested. The intestate, at the time of his death, was the owner of two farms, with a considerable amount of personal property thereon. The larger farm was incumbered by real estate mortgage held by one Webster. Upon the small farm were two mortgages, one for \$800, and one for \$200, originally given to one Edwards, but assigned to the wife of the administrator prior to the death of the intestate. The bond of intestate accompanied the \$800 mortgage, but not the other. The small mortgage was given to secure the repayment of money loaned by Edwards to intestate, but contained no covenant to pay the same, nor does it appear that any note or other written evidence of the indebtedness was given. Shortly after the death of intestate, the wife of the administrator, at his suggestion, and through his advice, began a foreclosure of the \$800 mortgage,

which resulted in a sale of the premises to the administrator for the sum of \$700, and in a deficiency judgment of \$320. Very soon thereafter, Webster began a foreclosure of his mortgage, and prosecuted the same to judgment and sale of the premises, the administrator and his partner, one Taylor, purchasing the same. About the time of this last sale the administrator caused the personal estate of intestate to be sold at public auction, and the same was purchased by the said Taylor, who directly thereafter transferred a one-half interest in the same to the administrator. The total amount paid by Taylor and the administrator for the real estate was much less than the actual value thereof. After the completion of the Webster foreclosure, proceedings were instituted to obtain the surplus moneys arising therefrom, which resulted in an order of the special term of the Supreme Court for the payment of the same to the administrator. The amount of such surplus was \$959.03, and was paid to the administrator December 31, 1891. After the foreclosure on behalf of the wife, Mrs. Saunders, was completed, she caused a statement of her claim against the estate to be prepared, setting forth the amount of her deficiency judgment, also the amount of her \$200 mortgage, and the same was presented by her attorney to the administrator for payment, who formally rejected the same, and an agreement for a reference of the claim under the statute was prepared by said attorney, a referee selected, and the parties appeared before the referee, the wife accompanied by her attorney, the administrator without counsel, and such formal proof thereupon taken that the referee reported in favor of the entire claim, including the amount of said \$200 mortgage, which report was confirmed, without opposition on part of the administrator, and judgment entered thereon; and among the various items with which the administrator credits himself in his account is the total amount of this judgment, and, while contestants concede that it is not permissible in this proceeding to attack the validity of this judgment, they contend that the conduct of the administrator in neglecting to defend against this claim renders him personally liable for all

thereof, except the original amount of the deficiency judgment. In other words, the contestants assert that there was no necessity or authority for a reference so far as the deficiency judgment was concerned, and that the expenses of such reference were needlessly made, and that no part of the \$200 mortgage was a valid claim against the estate, and that it was solely through the negligence of the administrator that it was permitted to assume the form of a judgment against the estate.

It is undoubtedly true that this judgment itself cannot to any extent be impeached upon this accounting. It has become an absolute claim against the estate, and, in consequence, necessarily payable from the funds of the estate; and the only object in now examining the merits of the claim, so far as the \$200 mortgage is concerned, is to determine whether the facts refute or sustain the charge of negligence made against the administrator; and for such purpose it is competent to inquire, first, whether such claim was originally valid, and, second, if not, whether the administrator has exercised reasonable care and prudence in defending against it; for, if such claim was in the first instance a valid and binding one, no negligence can be attributed to the administrator for failing to defend, but if originally invalid, and it has assumed its present form in consequence of the collusion, heedlessness, or negligence of the administrator, then he is liable personally. The duties of an executor or administrator in the performance of his trust are well defined. Such acts of carelessness or negligent administration as defeat the rights of creditors, legatees, or other parties entitled to distribution amounts to a devastavit. If one accepts such office, he is bound to use due diligence, and not suffer the estate to be injured through his neglect. He is required to exercise such prudence and diligence in the management of the estate as men of discretion and intelligence in general employ in their own like affairs. *Hollister v. Burritt*, 14 Hun, 291-293; *McRae v. McRae*, 3 Bradf. Sur. 199; *McCabe v. Fowler*, 84 N. Y. 314. It is provided by statute that "no mortgage shall be construed as implying a covenant for the payment of

the sum intended to be secured, and when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage." 1 Rev. St. p. 738, sec. 139. The slightest reference to the authorities bearing upon this question shows that this claim upon the \$200 mortgage originally had no semblance of validity or legality against the estate. The remedies of the original mortgagee were confined to the land covered by the mortgage, and Mrs. Saunders, the assignee, obtained no greater rights. *Severance v. Griffith*, 2 Lans. 38; *Hone v. Fisher*, 2 Barb. Ch. 560; *Gaylord v. Knapp*, 15 Hun, 87; *Vrooman v. Dunlap*, 30 Barb. 203; *Spencer v. Spencer*, 95 N. Y. 353.

What, then, was the duty of the administrator upon the presentation of this claim? What would an ordinarily prudent man have done under the same circumstances in the management of his own affairs? What would this administrator himself have done had the claimant been other than his own wife? The exercise of reasonable diligence not only required him to formally reject such claim, but to resist payment, and to resort to the usual methods of defense for the purpose of defeating a recovery thereon. How has he performed such duty? This question may be best answered by quoting from his own evidence. When this claim was presented by the attorney for the wife, the administrator says:

"I think I asked him if there was not some other way of getting at it than for me to allow the claim. He asked me if I would not allow it. He said it could be referred. I think that was the way it was left. I might have asked how or in what way it could be done. He said he could select a referee, with the surrogate's approval, to inquire into it. I agreed to that. I said I thought that the better way than for me to allow it. He was representing both of us in what he did in the matter. He was my attorney, as administrator, up to that time, and has been ever since. Seems to me he drew up a paper that day

naming a referee, and I signed it. There was no bond with this mortgage. I owned it at one time. I do not know as I ever knew what point was going to the referee for determination. After this claim was made out and presented to me, I never went to consult with any other attorney as to what was best for me to do, nor did I talk with any of the other heirs, unless it was Mrs. Weaver, and I don't know as I talked with her. The hearing was held at the attorney's office. The attorney, the referee, my wife, and myself were present at the time of the hearing. I had no attorney there to represent my side of the case. Mr. Allen was there, but I don't know whether he was acting for me or for her. I gave no proof upon the hearing. I made no opposition to the motion for confirmation of the referee's report in favor of this claim."

The evidence shows that the proceedings before the referee were merely formal. The attorney for the wife presented these mortgages, and stated the facts concerning them. No authorities were cited, and no argument made. The report was drawn by the attorney, and signed by the referee; confirmed by the special term, without opposition; and judgment entered thereon. Upon carefully reviewing all the evidence, I am firmly of the opinion that the administrator, while himself doubting the validity of this claim, yet willing to have it in some manner made binding upon the estate, neglecting to employ counsel to represent and protect the interests of the estate before the referee, neglecting to oppose the motion for confirmation of the report, failing to take any appeal from the judgment rendered thereon, or any other measures to relieve the estate therefrom, was guilty of such a degree of negligence as to make him liable personally. I see but little force in the suggestion, on behalf of the administrator, that, if contestants desire to free themselves from the burden of this judgment, they must do so by moving to set the judgment aside. Possibly they might secure relief in that manner, but they should not be driven to that expedient. Adequate relief can be afforded them in this proceeding by holding that the estate has sustained this loss in

consequence of the fault and neglect of the administrator, and that he must make the loss good.

But it is suggested that every fact relating to this mortgage in question was fully presented to the referee, and that the administrator, by the exercise of the utmost diligence, could have established no further facts. That may be true, but the difficulty with that proceeding does not seem to have been so much with the facts as with the law applicable thereto. It was no more the duty of the administrator to secure a full presentation of the facts before the referee than it was to secure the services of some competent person to present to the referee the legal principles applicable thereto, and it is entirely apparent that the slightest reference to the authorities above cited would have resulted in defeating this claim. In place of providing the estate with the protection which would have been afforded by the services of a competent attorney upon the hearing, the administrator attends such hearing alone, objects to nothing, but evidently acquiescing in and consenting to all that was being said or done to fix this liability upon the estate. In other words, he practically, and it seems to me needlessly and unjustly, submitted to a default in this matter. While it is difficult to understand how the interests of this estate have been in the least subserved by the reference to the claim based upon the deficiency judgment, and while it may be very seriously doubted as to whether there was any sanction or authority for such practice, I am hardly willing to go to the extent of holding that the administrator should be personally charged with the expenses and disbursements of such reference.

The personal estate of the intestate consisted, in part, of thirty-six dairy cows, one ox team, and one horse team, besides various farming tools and implements. The administrator used such personal property, to a greater or less extent, from the death of the intestate to the sale thereof, on the 3rd of August, 1891, and had the avails thereof for his own individual benefit. The evidence shows that the use of such property during that

time was fairly worth the sum of \$288, and the administrator should be charged with that amount.

No claim is made against the administrator for interest upon the proceeds of the sale of the personal estate, but it is claimed by the contestants that he should be charged with interest upon the surplus moneys received by him as above stated, to wit, \$959.03, on December 31, 1891. He accounts for no interest thereon, nor does the evidence show that he has actually received any income therefrom, but there was nothing in the financial condition of this estate which justified the administrator in permitting this fund to lie idle and unproductive. He was entitled to a reasonable length of time in which to invest it. Six months was entirely sufficient for that purpose, and he should be charged with interest thereon after the expiration of six months from date of its receipt by him. *Halsted v. Hyman*, 3 Bradf. Sur. 426; Redf. Law & Pr. Sur. Cts. (3rd Ed.) 519.

The remaining questions in this case relate to the administrator's personal claim. A portion of such personal claim consists of three promissory notes made by the intestate, and payable to the order of the administrator. The execution and delivery of these notes is established by the evidence. Their validity as subsisting claims against the estate is substantially conceded. The only question regarding them is as to the time for which interest should be allowed the administrator thereon, the contestants objecting to the allowance of any interest thereon after the sale of the personal estate, and the receipt by the administrator of sufficient funds therefrom to fully satisfy these demands. Executors and administrators are expressly forbidden by statute from retaining any portion of the estate in satisfaction of their own debt or claim "until it shall have been proved to and allowed by the surrogate." 2 Rev. St. p. 88, sec. 33. Upon the judicial settlement of an executor or administrator, he may prove any debt owing to him by the decedent. Code Civil Pro. section 2739. But the surrogate has no jurisdiction to entertain a proceeding solely for the purpose of proving such personal claim. *In re Ryder*, 129 N. Y. 640, 29 N. E. Rep. 309. So

the situation is that, while the administrator is forbidden by statute from paying his own claim until it shall have been properly established, he is afforded no opportunity, under the rules of practice, of so establishing the same until the judicial settlement of his accounts: It cannot be claimed that the administrator in this case has unreasonably delayed such judicial settlement. He is in no manner responsible for the delays which the law has imposed upon him in the adjustment of such claim, and he should not be deprived of his interest.

The balance of the administrator's personal claim consists of various items of account for work performed and money expended by the administrator for the intestate from May 27 to September 26, 1890, amounting in all to the sum of \$336.60. The claim is verified in the usual manner, and admits payments of various sums upon said account, to the amount of \$195.45. While the administrator is required to present his claim, accompanied by his affidavit, verifying the same, before it can be allowed (*Terry v. Hayton*, 31 Barb. 519), such verification in no way establishes the validity of such claim. The existence of the debt must be established by legal evidence. *Underhill v. Newburger*, 4 Redf. Sur. 499; *Williams v. Purdy*, 6 Paige, 168. Claims on part of personal representatives against the estates they represent are regarded with more or less suspicion when not founded upon some written obligation to pay. *Wood v. Rusco*, 4 Redf. Sur. 380; *Kearney v. McKeon*, 85 N. Y. 136, 137. Upon the trial no evidence was given establishing, or tending to establish, some of the items of said account. The evidence relating to the balance thereof was very slight and unsatisfactory, but perhaps sufficient *prima facie*; and, allowing the utmost latitude to the testimony offered in support of this claim, the total amount of all items proven is the sum of \$193.39. It is contended that no part of this amount even should be allowed; that the presumption arising from the giving of the note by intestate to the administrator under date of November 25, 1890, which was after the close of the account sought to be established, is that such note was given in full set-

tlement of all mutual accounts up to that date, and there seems to be some authority for such contention. *Lake v. Tysen*, 6 N. Y. 461; *Maxon v. Scott*, 55 N. Y. 249. It is not, however, necessary to determine to what extent these authorities are applicable to this case, as there appears to be a more serious objection to the allowance of any part of this account. The account filed and verified by the administrator admits actual payments thereon, stating the date and amount of such payments, respectively, aggregating the sum of \$195.45. Such admission cannot be overlooked or disregarded in this matter, although there was no other evidence of payment presented on the trial. Such account is in the nature of a pleading. It is a part of the records of the case. It concedes payments to substantially the full amount of the claim established, and there is no authority for holding that such payments should be applied upon that portion of the account which the administrator, in consequence of his disability as a witness, or for other reasons, is unable to establish. But it is urged by the administrator that contestants cannot avail themselves of the admission of payment in the account without coupling such admission with the allegation of indebtedness therein, taking it all together; that we are not permitted to select from the account filed a portion thereof, unfavorable to, and militating against, the administrator, and disregard the other portion in his favor. However much force there may be to these suggestions, the courts have held directly to the contrary. *White v. Smith*, 46 N. Y. 418.

A decree will be entered in conformity with the conclusions above stated.

In re HOWARD'S ESTATE.

(3 Misc. Rep. 170.)

*(Surrogate's Court, Cattaraugus County, Filed March, 1893.)***1. CONSTRUCTION OF WILL—ORIGINAL GIFT.**

Testator directed that the residue of his real estate should, upon the decease of his wife, to whom he had given the income thereof for life, descend (*inter alia*) "to my sisters and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns. The children of any of my sisters or my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife." A sister of testator had died before the execution of the will, leaving a son whom testator had no reason to disinherit. *Held*, that such son was entitled to take the share his mother would have received had she survived testator's widow, not by way of substitution, but as a substantive independent original gift.

2. SAME—LAPSED LEGACY—RESIDUE.

Such will directed payment of the income to the widow for life or until her remarriage, and in the latter event she was to receive only one-half the income. The widow remarried, and thereupon the executor paid half the income to the testator's father (to whom testator gave the estate upon his wife's death) for his life, and upon his decease (prior to the wife's death), paid a part of the income to one of the residuary legatees under the father's will. *Held*, that the moiety of the income which lapsed upon the widow's remarriage became a part of the residue.

3. JUDICIAL SETTLEMENT—RES ADJUDICATA.

As such payments to the father had been allowed on a prior account of the executor, the judicial settlement thereof was *res adjudicata* on the subject.

4. ACCOUNTING—ADVANCEMENT.

The payment to the father's residuary legatee, who was also one of the residuary legatees under testator's will, should be treated as a payment to her upon her distributive share.

5. EXECUTORS—DEATH OF LIFE TENANT.

The executor will not be charged with interest on the funds of the estate after the death of the widow, when conflicting claims, which are

being litigated, are made to the residue, and he holds the funds in readiness to pay the parties entitled thereto on the termination of such litigation.

6. EXECUTOR—COMPENSATION.

An executor, who is an attorney, will not be allowed compensation for appearing on his own account, and on behalf of others interested, in an action brought to determine conflicting claims to a residuary share, other than the commissions allowed executors by law.

7. SAME—TOMBSTONE.

An expense of \$300 for a tombstone will be allowed when the estate amounts to much over \$6,000, the rights of creditors are not impaired, and the residuary legatees are collateral relatives only.

Judicial settlement of executor's accounts.

Norman M. Allen, executor, in person; J. M. Congdon, for Frank Parsel and others; W. S. Thrasher, for Henry Milks and others; J. E. Bixby, for Charlotte Kavanaugh; D. E. Powell, for Mr. Holtz.

DAVIE, S.—Norman Howard died in the town of Dayton, Cattaraugus County, on or about the 12th day of March, 1866, having no children or lineal descendants, and leaving a will dated March 10, 1866, which was admitted to probate by the Surrogate's Court of said county April 3, 1866. Testator left him surviving, his widow, Betsey Howard, his father, Harry, and mother, Delila, Howard. At the time of the execution of said will, and the death of the testator, he had three sisters living—Charlotte Kavanaugh, Emeline Parsel, and Harriet Parsel. Another sister, Amanda Milks, died several years prior to the death of testator, leaving a son, Henry Milks, who still survives, and is the only heir of the said Amanda Milks, deceased. Alexander Howard, a brother of testator, also died before testator's death, leaving three children—William Howard, James E. Howard, and Amanda D. Countryman—all of whom are now living, and are the only heirs of the said Alexander Howard, deceased. Testator's two sisters, Charlotte Kavanaugh and Emeline Parsel, still survive. The other sister, Harriet Parsel,

died April 15, 1869, leaving her surviving, her husband, who is now deceased, and two sons—George Parsel, who is deceased without issue, and Frank Parsel, who still survives, and who is the only heir of the said Harriet Parsel, deceased. Harry Howard, the father of testator, died May 12, 1881; Delila Howard, the mother of testator, died in the month of August, 1888; and Betsey Howard, his widow, died on the 21st day of July, 1900. By the terms of his said will the testator bequeathed all his personal property to his widow, absolutely, and also gave and bequeathed to her the use and income of all his real estate, and the interest accruing from investment of the proceeds of sale of such real estate, in case a sale should be made, during her lifetime, but provided that in case of her remarriage she should be entitled to only one-half of such use, avails and income after such remarriage. Testator designated and appointed Norman M. Allen as the executor, and the said widow, Betsey Howard, the executrix, of said will, and authorized and empowered them to sell and convey said real estate, when they should deem it for the best interests of said estate so to do. Testator bequeathed to his cousin Daniel Howard a claim or demand which testator held against him, of about \$175. He also bequeathed, at the death of his said wife, Betsey, the sum of \$500 to his nephew, Arthur Hull; the same amount to Frederick Milks, the son of said Henry Milks; and the sum of \$1,000 to the children of his deceased brother, Alexander Howard. After such bequests the said will further provides as follows:

“At the decease of my said wife, all the rest, residue and remainder of my said estate, after paying the bequests before made, shall descend to my father, Harry Howard, if he shall then be living, and, if he shall not be living at the time of the decease of my said wife, then the same shall descend to my mother, Delila Howard, if she shall then be living; and, if she shall not then be living, then the same shall descend to my sisters, and their heirs and assigns, and to the children of my deceased brother, and their heirs and assigns. The children of any of my sisters or my brother are only to receive the same

share that my brother or sisters would receive if they were living at the decease of my said wife."

The said widow, Betsey Howard, remarried in about one year after the death of the testator; and after such remarriage, and within about two years from testator's death, the said executor and executrix, under the power given them in said will, sold all the real estate of which testator died seized, and converted the same into money and securities. The surviving executor, Allen, now files an account of his proceedings as such, for judicial settlement, from which it appears that there is a residuum for distribution under the provisions of the item of said will above quoted; and a determination of the question as to who is entitled to the same necessitates a construction of said item of the will. The question raised is whether or not the said Henry Milks is entitled to share in such distribution.

It will be observed that none of the parties claiming the right to participate in such distribution are lineal descendants of the testator. The controversy is one entirely among collaterals, and the claimant is of the same degree of relationship to testator as some of the parties who are contesting his right. Various general rules have been formulated for the construction of wills, but the fundamental principle of interpretation is that the intention of the testator, where such intention can be ascertained and carried into effect, shall govern; and, when the language of a testamentary provision is equivocal or ambiguous such intention must be sought by reference to all the other provisions, and to the attendant facts and circumstances (*Ritch v. Hawxhurst*, 114 N. Y. 512, 21 N. E. Rep. 1009), and such construction should be adopted as to give effect, if possible, to all the provisions, without rejecting any clause or sacrificing any interest for repugnance, where such provisions can be reconciled (*Taggart v. Murray*, 53 N. Y. 233), and, where it appears that the testator designed and intended a general scheme for the disposition of his property, such scheme should be carried into effect, when not inconsistent with the rules of law (*Roe v. Vingut*, 117 N. Y. 204, 22 N. E. Rep. 933). In this case the questions

arise—First, was it not the design and intention of the testator, as evidenced by the item of the will above set forth, and all the surrounding facts and circumstances, to provide a general scheme for the distribution of the residuum of his estate, after the expiration of the life estate, among certain classes of relatives, the members of such classes to be determined at the time of distribution; and, second, if such was the design, is the claimant Henry Milks included in either of such classes?

It is entirely apparent that the testator did not design or intend an immediate gift of any portion of his estate to his sister, or the heirs of a deceased sister or brother, with simply the time of payment or enjoyment postponed to the death of the widow. The element of futurity is annexed to the substance of the gift. The particular parties entitled to take could not be determined until the death of the wife. The gift was not to particular persons *nominatim*, but to certain classes existing at the termination of said intermediate estate. The language of the provision is quite distinct:

“After the death of my said wife, * * * all the rest, residue and remainder of my estate shall descend * * * to my sisters, and to their heirs and assigns, and to the children of my deceased brother, their heirs and assigns. The children of any of my sisters or brother are only to receive the same share that my brother or sisters would receive if living at the decease of my said wife.”

Consequently, I am of the opinion that it should be held that the parties constituting the said classes at the date of the death of Betsey Howard are entitled to take under said provisions of the will, not in any manner by substitution, but as original legatees. Does Henry Milks belong to either of these classes? There is no intimation from the evidence in this case, or from the history of the family, that any reason existed to induce testator to discriminate, in the final disposition of his property, against his nephew Henry Milks, no suggestion that the son of the deceased sister did not sustain the same relations to the testator as did the children of the deceased brother, or why one

should be less the object of his bounty than the others. No ill will on the part of the testator towards Henry Milks is shown, nor does it appear that the testator did not entertain the same degree of love and affection for his sister Amanda, while she was living, as for the other sisters who survived her. No facts are presented showing, or tending to show, that the claim of those seeking to deprive Henry Milks of his right to participate is fair, just, or in harmony with the wish of the testator, but we are asked to exclude him simply from an arbitrary reading of the clause of the will referred to, unaided by any explanatory circumstances. This I am not willing to do. It has been distinctly decided that where the language of a limitation is capable of two constructions, one of which would disinherit an heir, and the other not, the latter will prevail. The intent to disinherit will not be imputed to a testator by implication, nor when he uses language capable of a construction which will not so operate. *Low v. Harmony*, 72 N. Y. 414. It is true that the case cited has particular reference to lineal descendants, but the reason of the rule is equally applicable where the controversy, as in this case, is entirely between collaterals. Of course, Henry Milks could not take any portion of this estate by substitution, but his claim is not based upon any such ground. "Where the children of the deceased person found their claim, not on a mere clause of substitution, but on a substantive, independent, original gift comprehending them, concurrently with another class of objects, the gift will extend to the children of the persons who were dead when the will was made." 2 Jarm. Wills (Bigelow's Ed.), 775; *In re Crawford*, 113 N. Y. 374, 21 N. E. Rep. 142; *Teed v. Morton*, 60 N. Y. 502. It must therefore be held that Henry Milks, Charlotte Kavanaugh, Frank Parsel and Emeline Parsel are each entitled to the one-fifth part of the residuum of said estate, and that the remaining one-fifth part be divided equally between William Howard, James E. Howard and Amanda D. Countryman.

After the remarriage of the widow, Betsey Howard, the one-half part of all the interest accruing upon said estate, down to

the time of her death, was paid to her and to her representatives. The other one-half was paid to Harry Howard during the time he survived after such remarriage. Upon what theory or principle such payment was made to him does not appear, and it is perhaps of little consequence at this time to inquire, for the judicial settlement of the executor's accounts under date of September 2, 1886, where such payment was allowed and credited, is undoubtedly *res adjudicata* upon that subject; but it does become a question for determination upon this accounting as to what disposition shall be made of the one-half part of said income accruing after the death of Harry Howard to the time of the death of the widow, Betsey Howard. The said Harry Howard left a will which was admitted to probate, and in which he appointed Emeline Parsel and William Howard executors, and in which certain specific bequests and devises were made, and the residuum of his estate was given to Charlotte Kavanaugh and Emeline Parsel, and since the death of Harry Howard the executor, Allen, has paid from time to time certain sums out of such accruing interest to the said Emeline Parsel, amounting in all to \$619. The executors of the will of the said Harry Howard, deceased, derived no title, under his will, or from any source, to any part of such accumulating interest. Upon the remarriage of the widow the one-half part of the legacy to her, under the second item of said will, lapsed, and became a part of the estate for distribution. The rule is well settled that, where a will contains a general residuary clause, lapsed legacies go, not to the next of kin, but into the residue. *In re Benson*, 96 N. Y. 499; *Riker v. Cornwell*, 113 N. Y. 115, 20 N. E. Rep. 602. So, then, it must be held that the one-half of such income as accrued upon this estate after the death of Harry Howard constitutes a part of the residuum to be disposed of under the seventh item of said will, and the payments made to the said Emeline Parsel must be treated as an advancement or payment to her upon her distributive share.

In the account filed, no interest is credited to the estate or charged to the executor after the date of the death of the widow,

Betsey Howard, and in the objections filed to said account it is alleged that the executor should be charged with interest from that time. It does not appear from the evidence that any interest or income has been actually received by the executor since the death of the widow. So the question is whether the executor should be charged with interest by way of penalty for not investing the funds of said estate since that time. No funds or property belonging to the estate came into the hands of the executors, except that specifically bequeathed to the widow, until the sale of the real estate. There were times during the administration of said estate when all the funds thereof were invested, and other times when only a part thereof was, or could be, invested, although the executors used due diligence in making such investments. In the various accounts filed for judicial settlement, the executors are charged, and the estate credited, with interest upon the entire *corpus* of the estate, from the time of the sale of the real estate, at the rate of 7 per cent., to the 1st day of January, 1880, and at the rate of 6 per cent. from that time to the death of the widow, without any deductions whatever for such times as a part of the estate could not be invested. Shortly after the death of the widow the surviving executor began making preparations for closing up the affairs of the estate, paying the legacies, and attending to such other preliminaries as necessarily preceded a final settlement. In this, however, he was embarrassed and delayed by certain conflicting claims made upon him for payment of some of the legacies and distributive shares. Several persons claimed the share of William Howard, and several actions were brought regarding the share of Charlotte Kavanaugh, and in one of such actions, in which the executor, Allen, and the executrix, Betsey Howard, were named as parties defendant, an injunction was procured and served, restraining and enjoining the said executors from paying over any portion of the share of said Charlotte Kavanaugh until the further order of the court therein. Said suits are still pending and undetermined, without any fault or neglect on the part of the executor; and in view of these facts, and the

further facts that the specific legacies were due and payable at the death of the said widow; that said litigations were liable to be terminated at any time, and said parties, therefore, in situation to demand payment of their respective shares—the said executor was justified in holding the funds of said estate in readiness to meet such demands, and he should not be charged with interest because he has exercised such right.

In the various litigations brought in relation to the distributive share of Charlotte Kavanaugh, the executor, Allen, who was an attorney, appeared on his own account, and for certain other defendants who were interested in said estate, and rendered services as such attorney in and about the defense of said actions. While it is clear that such services were rendered in good faith, and for the benefit of said estate, the executor is not entitled to any compensation therefor, other than such commissions as are allowed him by law. *Collier v. Munn*, 41 N. Y. 143; *Lent v. Howard*, 89 N. Y. 169.

The remaining question relates to the indebtedness of \$300 incurred by the executor for a tombstone to be placed at the grave of the testator. Shortly after the death of testator the executor caused an inexpensive tombstone to be placed at his grave. The remains of deceased were subsequently removed to another burial place, and thereafter the executor entered into an agreement for the purchase of another tombstone for testator at an expense of \$300. The expense of a tombstone, if not excessive, will be allowed to an executor, upon his accounting. *Wood v. Vandenberg*, 6 Paige, 277. The term "funeral expenses" includes the cost of a suitable tombstone to be erected at the grave of the deceased. *Owens v. Bloomer*, 14 Hun, 296. This expenditure being such a one as the executor was authorized to make, the only question is as to whether the amount is reasonable or not. In *Re Erlacher*, 3 Redf. Sur. 8, where the estate amounted to \$2,625, it was held that the administrator should be allowed only \$250 of the \$700 expended by him for monument, and inclosing burial lot. In *Re Mount*, id. 9, note, the administrator, out of an estate of \$938, paid \$425 for

funeral expenses; and it was held that only \$200 should be allowed for funeral expenses, and \$50 for a gravestone. In *Valentine v. Valentine*, 4 Redf. Sur. 265, an expenditure of \$350, where the estate was \$13,000, was held not unreasonable. So it is apparent that there is no arbitrary rule for determining the question of reasonable funeral expenses and expenses of tombstone, but each case must be disposed of upon its own particular circumstances. In this case there was originally an estate of over \$6,000, with accumulations thereon to much more than that sum. The rights of creditors are in no manner impaired by the expenditure, and, as against the legatees under the will of testator, all of whom are collateral, it must be held that the expense incurred is reasonable and proper.

(Note as to expenditure for tombstones, headstones and monuments:)

STATUTE.—GENERAL OBSERVATION.—WHAT IS A REASONABLE EXPENDITURE.—WHAT IS AN UNREASONABLE EXPENDITURE.—BEQUEST OF ENTIRE ESTATE FOR MONUMENT.—LEGACY FOR MONUMENT.—INSOLVENT ESTATES.

STATUTE.

It is provided by the Code of Civil Procedure, section 2749, that the expression "funeral expenses" includes a reasonable charge for a suitable headstone.

GENERAL OBSERVATION.

A reasonable expenditure suitable to decedent's estate and condition in life will be allowed for the cost of a tombstone. (*Wood v. Vandenburg*, 6 Paige, 277; *Ferrin v. Myrick*, 41 N. Y. 315; *Tickel v. Quinn*, 1 Dem. 425; *Owens v. Bloomer*, 14 Hun, 296; *Sheelz's Est.* [Pa.], 2 Woodw. Dec. 407; *Griffith's Est.* [Pa.], 1 Lack. L. N. 311; *Webb's Est.*, 165 Pa. St. 330; *Griggs v. Vaghte* [N. J.], 47 N. J. Eq. 179; *Spire v. Lovell* [Ill.], 17 Ill. App. [17 Bradw.], 559; *Van Ernon v. Superior Court* [Cal.], 76 Cal. 589; *Hatchett v. Curbow* [Ala.], 59 Ala. 576; *Craps v. Armstrong* [Iowa], 61 Iowa, 697.)

But where a decedent was a plain man, of economical and saving habits, a former member of the Society of Friends, a credit of \$1,000 for a monument was reduced to \$100, although decedent left an estate of \$110,000, as the contrast between a monument costing \$1,000 and decedent's habits and mode of living would be so great as to provoke comment, which such memorials should not do. (Taylor's Est., 3 Pa. Dist. Rep. 691.)

WHAT IS A REASONABLE EXPENDITURE.

In *Matter of Laud*, 42 Hun, 126, an expenditure of \$403 for a tombstone out of an estate valued at from \$10,000 to \$15,000 was held reasonable in amount, considering decedent's indebtedness at his death.

In *Matter of Beach's Estate*, 1 Misc. 27, it was held that \$400 for a tombstone out of an estate of \$8,000 would be allowed (although the expenditure reached the limit where it might be held to be unreasonable), the rights of creditors not being impaired, and none of the legatees but the widow objecting to the expenditure, especially as the executor had in good faith contracted for the monument, which was ready for delivery.

The expenditure of the sum of \$200 for a tombstone out of personal estate valued at \$26,000 is not extravagant. (*Campbell v. Purdy*, 5 Redf. 434.)

When a decedent's estate, after paying all debts, would, including real estate, leave a surplus of several thousand dollars, and the administratrix and decedent (her husband) had lived happily together for more than thirty years on the same farm, the court considered that the administratrix had done right in expending \$175 for a monument over his grave. (*Allen v. Allen*, 3 Dem. 524.)

A testator directed by his will that his executor should erect a suitable monument to his memory. Decedent left personal estate to the value of over \$226,000, besides considerable real estate. The executor expended \$6,000 in the erection of a monument. The testator was in some respects a remarkable man, who had accumulated a considerable fortune, a handsome part of which he bequeathed, on account of their pecuniary condition, to the widow and children of General "Stonewall" Jackson, and a still larger part of which he left for the education of white children in Tennessee. The only objection came from

the residuary legatee, the widow approving of the expenditure. *Held*, that as the selection of the monument in reference to its suitability, was left entirely to the discretion of the executor, the court could not say that the executor, although liberal in his outlay, had so abused his discretion as would justify the interference of the court, especially as it had passed the ordeal of the lower courts and referees. (Cannon v. Apperson, 14 Lea [Tenn.], 553.)

WHAT IS AN UNREASONABLE EXPENDITURE.

When the estate amounted to \$2,625, an expenditure of \$670 for a monument was considered excessive, and \$250 only was allowed. The court said that the expenses of a monument should have been postponed till the amount of the estate was ascertained, and that, in any case, they would not be a proper charge as against creditors. (Matter of Erlacher, 3 Redf. 8.)

An expenditure of \$500 out of an estate valued at \$8,000 was considered excessive. (Owens v. Bloomer, 14 Hun, 296.)

A testator directed, by his will, his executor to erect a suitable monument over his grave, and left the expense thereof entirely discretionary with him. The executor contracted for the erection of a monument to cost \$1,455. The estate was valued at \$11,000. *Held*, that although an absolute discretion was conferred upon the executor, it should be exercised according to law and the principles of justice, and the residuary legatee objecting, the proposed expenditure should be reduced to \$700. (Matter of Luckey, 4 Redf. 95.)

In Burnett v. Noble, 5 Redf. 69, the executor, who was vested with an absolute discretion for the purpose under the will, asked that \$700 should be allowed for a monument, and it was *held* that as the estate for distribution amounted only to \$2,000, a sum of \$250 would be a reasonable allowance, as the executor's discretion should be exercised within the limits of law.

Where the real and personal estate was of the value of \$17,000, an expenditure of \$2,000 for a vault and tomb was reduced to \$1,000, as the court found no sufficient reason in facts or in law for the allowance of so large a sum without express authority in the will. (Matter of Shipman, 82 Hun, 108.)

BEQUEST OF ENTIRE ESTATE FOR MONUMENT.

In Emans v. Hickman, 12 Hun, 425, the facts were: Tes-

tator made his will as follows: "To my executor, all money in my possession, all money due from any source or sources whatever, and all property of every kind and description held by me, for my funeral expenses and the erection of a monument to my memory in the Purdy yard, Phillipstown, Putnam County." Testator's estate amounted to \$1,200. The executor brought the action for the construction of the will. *Held*, that as the will contained no direction to the executor to expend the whole of his estate for the purposes expressed, nor contained any limitation of the executor's discretion on the subject, the testator intended only that a reasonable sum should be expended for funeral expenses and a monument, and that the balance should go to his heirs-at-law; that as no creditor would be injured, and the heirs consented, \$150 was a sufficient sum to expend for a monument—and that after such expenditure and the payment of reasonable funeral expenses, the balance was to be distributed amongst testator's heirs-at-law as in cases of intestacy.

The court observed that "No doubt it was competent for testator to direct that the whole estate should be spent for his funeral expenses, and for a monument," and that the question was whether the will manifested such an intention.

LEGACY FOR MONUMENT.

In *Masters v. Masters*, 1 Peer, Wms. Rep. 423 (6th London Ed.), it was held that a legacy of £200 given by testatrix for a monument for her mother, being a debt of piety to the memory of her mother, from whom the testatrix received the greater part of her estate, should not abate with other legacies, when there was a deficiency of assets, but should be paid in full.

This decision was followed in *Wood v. Vandeburgh*, 6 Paige, 285.

INSOLVENT ESTATES.

A credit will not be allowed for the cost of a headstone where the estate is insolvent. (*Villee's Est.*, 9 Lane L. R. [Pa.] 353; *Little v. Williams*, 7 Ill. App. 67; *Lund v. Lund*, 41 N. H. 355.)

In re HESDRA'S ESTATE.

(Surrogate's Court, Rockland County, Filed April 28, 1892.)

1. EXECUTOR—EXECUTION—LEAVE TO ISSUE.

The surrogate cannot permit executions to issue on judgments against an executor (Code Civ. Pro. sec. 1825) when the assets are small, and the claims, several of which are in litigation, large, as he cannot to a measurably certain extent ascertain and determine the debts and claims against the estate, and the sums for the recovery of which an execution should be permitted to issue (Code Civ. Pro. sec. 1826), and when, in any event, the small amount of assets was necessary to meet the considerable expenses attending the litigation of the claims.

2. SAME—REAL ESTATE—EQUITABLE CONVERSION.

Real property directed by the will to be sold for the purpose of administering the estate, is real property within the meaning of section 1823, Code Civ. Pro., providing that "Real property which belonged to a decedent is not bound * * * by a judgment against his executor * * * and is not liable to be sold by virtue of an execution issued on such a judgment, unless the judgment is expressly made by its terms a lien upon specific real property therein described, or expressly directs the sale thereof," and does not become equitably converted into personal property so as to enable the surrogate to grant leave to issue execution on judgments against the executor under Code Civ. Pro. secs. 1825-6, which only authorize execution against personal property.

Applications by creditors who had recovered judgments against decedent's executor, as such, for leave to issue executions thereon. Denied.

Charles A. Dunham and J. A. Henderson, for applicants;
Bangs, Stetson, Tracy & MacVeagh, for administrator c. t. a.

WELANT, S.—These applications are for leave to issue executions under sections 1825 and 1826 of the Code of Civil Procedure, and were heard together, and submitted upon the petition and affidavits. It appears from the petition and papers herein that the testator, Edward D. Hesdra, died about June 6, 1884, leaving a last will and testament, of which he appointed Millard F. Onderdonk the executor. That the said will was

admitted to probate about January 6, 1888, and that letters testamentary thereof were thereupon issued to said Onderdonk. 2 N. Y. Supp. 82. That in an action brought by the petitioner Dunham against said Onderdonk as such executor a judgment was recovered in the Court of Common Pleas of New York City on November 22, 1890, for the sum of \$1,182.24. That in an action brought by the petitioner Henderson in the same court against said Onderdonk as such executor she recovered judgment against him as such on May 5, 1890, for the sum of \$2,380.46. That thereafter, in a proceeding to remove said executor, a decree was made by this court revoking his letters testamentary, and thereafter, on or about September 18, 1891, upon due application and proceeding, the State Trust Company was appointed administrator with the will annexed of said testator Hesdra—and that said trust company accepted said trust, and entered upon its duties as such. That neither of said judgments has been paid, nor any part thereof. It further appears that very little, if any, personal property was left by the testator, and that his estate consisted quite entirely of real estate, the income of which was received by said Onderdonk while acting as such executor, and by the State Trust Company since its appointment as administrator aforesaid. The affidavit submitted on these applications in behalf of the trust company shows that at the time of the making of the same it had in its possession or control as such administrator of assets but \$291.87, which sum was cash. That the total amount received by it as such administrator, being income from the realty from the time of its appointment, was \$3,323.46, out of which it had paid items of expense incurred in the management of the estate property and the administration of the estate the aggregate sum of \$3,031.59. That there are claims against the estate aggregating more than \$6,000, and several of which are in litigation; that the condition of the affairs of the estate are intricate and unsettled, and in litigation, and that the expenses of managing the estate and administering the same will necessarily be large. Under this condition of the estate, and upon these facts, I am not convinced

that executions should be permitted to be issued upon these judgments. All these claims against the estate appear to be of the same class. A judgment obtained against an executor or administrator as such has no priority of payment over the other debts. *Melcher v. Fisk*, 4 Redf. Sur. 22; *James v. Beesly*, id. 236; *Schmitz v. Langhaar*, 88 N. Y. 503, 2 Rev. St. p. 87, sec. 28. "Where it appears that the assets, after payment of all sums chargeable against them for expenses and for claims entitled to a priority as against the plaintiff, are not or will not be sufficient to pay all the debts, legacies, or other claims of the class to which the plaintiff's claim belongs, the sum directed to be collected by the execution shall not exceed the plaintiff's just proportion of the assets." Code Civil Pro. section 1826. To comply with this provision it is essential that the court should to a measureably certain extent ascertain and determine the debts and claims against an estate. This cannot be done under the proofs which have been submitted to me. Claims against the estate are being litigated to the extent of some thousands of dollars. It is thus rendered impracticable for me to determine the sum for the recovery of which an execution should be permitted to issue on either of these judgments. In any event, it must necessarily be very small, and I am not prepared to say that the limited amount of assets in charge of the administrator can, in justice to it and other claimants, be taken or depleted, and applied in payment of these debts, in view of the considerable expenses that seem at all times to be attendant upon this estate because of the interminable stream of litigation that springs from its administration and settlement. *Sippel v. Macklin*, 2 Dem. Sur. 219; *Hauselt v. Gano*, 1 Dem. Sur. 36; *James v. Beesly*, 4 Redf. Sur. 236; *Schmitz v. Langhaar*, *supra*. It is only personal property that may be considered as assets within these provisions of the Code under consideration. "Real property which belonged to a decedent is not bound or in any way affected by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment unless the judgment is expressly made by its

terms a lien upon specific real property therein described, or expressly directs the sale thereof." Code Civil Pro. section 1823. To meet this provision, however, and the proposition that there are no assets that can be judiciously and safely applied in payment of these claims, the respective counsel for the petitioners contend that the whole estate must be regarded as converted into personal property under the provisions of the will authorizing and directing the sale of the realty for the purposes of the administration and distribution of the estate. It does not seem to me that the doctrine of equitable conversion is applicable in giving a construction to these provisions of the Code. The words "real property" in the section above quoted should be given the signification assigned to them in subdivision 6 of section 3343 of the Code, as "coextensive with lands, tenements, and hereditaments." The definition of "real property" found in section 2514, subd. 13, cited by the petitioners' counsel, is not applicable. That applies to matters enacted in the chapter relating specially to Surrogate's Courts.

We find these houses and parcels of land in question constituting substantially the whole of the testator's estate, and "which belonged to the decedent," in the form and of the description stated in the above definition. The statute says such "real property" shall not be sold by virtue of an execution issued upon judgments of the character of these under consideration, and the words are used with the significance of the quoted definition. If an execution were issued, these parcels of real property could not be sold as personal property, and title given as upon a sale of that class of property. It would have to be sold as real property. It seems to me that for the purpose of the enforcement of judgments against executors or administrators by execution, it is the purpose of this restrictive section (1823) of the Code to limit the remedy by execution to reaching such assets as in their form are personal property, known and defined as such under the Code, and to leave the creditor, as to the realty, to his statutory remedies, or to the enforcement of his rights by actions or proceedings in the proper courts. It may well be that, in contem-

plation of the provisions of the will of the testator, and for the purposes of carrying the same into effect, and the administration and distribution of the estate, the realty must be regarded and treated as personalty, but I am of the opinion that such principal is not applicable to this question. In *James v. Beesly*, 4 Redf. Sur. 236, the learned surrogate says: "It is true that in some cases where real estate is directed to be sold by executors it will be regarded as personal property; but not even then is it assets in the hands of an executor."

I have considered the many authorities cited by the counsel for the petitioners touching the doctrine of equitable conversion, and find that all have relation to the administration of the testator's estate, and the effectual and proper distribution and application of the same to accord with his intention as derived from his will, among those who acquire their rights or interests in his estate by virtue thereof, and not in point on the question here involved. So long as the real property of the decedent remains in the same condition or status that it had at the time of his death it cannot be reached by an execution such as is sought in this proceeding, but I do not determine how it might be considered after the exercise of the power of sale, and an actual conversion thereby made. Of course, I am considering this doctrine of equitable conversion as not applicable to the single question under consideration, and under the circumstances disclosed in this matter. Executions authorized by sections 1825 and 1826 of the Code are such only as can be issued against personal property or assets which are in the possession or under the control of the executors or administrators, and have no relation to real estate. *Lichtenberg v. Herdtfelder*, 103 N. Y. 302-306, 8 N. E. Rep. 526. The form of the execution, as no other is prescribed, is that required by section 1369 of the Code, to satisfy the same out of the personal property, omitting the provision as to real property. An execution against personal property in the hands of an executor or administrator must require the sheriff to satisfy the judgment out of that property. Code, section 1371. The personal property contemplated is such as is actu-

ally such, and not such as is regarded as such in contemplation of a "fiction of law" to carry out or give effect to some equitable principle. The personal property contemplated, out of which the execution is to be satisfied, is that which is susceptible to levy and seizure by virtue thereof. For the purpose of the construction of section 1823 of the Code, I am of the judgment that the lands of the testator retain their character of realty, at least until actually converted. While I have thus disposed of these matters upon the assumption that there was an equitable conversion of the real property under the will of the testator, but not, under the circumstances, subjecting it to execution on these judgments, yet the question as to whether or not such conversion will take place until an actual sale is debatable. *Clift v. Moses*, 116 N. Y. 144-156, 22 N. E. Rep. 393 *et seq.*

The applications are accordingly denied, but without costs.

In re GEROW'S ESTATE.

(Surrogate's Court, Rockland County, Filed February 22, 1892.)

1. EXECUTORS—JUDICIAL ACCOUNTING—ABSENCE OF VOUCHERS.

To entitle an executor to credit for payments for which he produces no vouchers, he must give competent evidence of such payment "other than his own oath." Code Civ. Pro. sec. 2734.

2. SAME—WHEN ENTITLED TO RETAIN COMMISSIONS.

An executor cannot deduct a sum in excess of his legal commissions, nor can he retain same until judicially allowed.

Judicial settlement of executrix's accounts.

Abram A. Demarest, for executrix; Snider & Hopper, for contestant.

WEIANT, S.—I find from the evidence the receipts and dis-

bursements of the executrix as set forth in the following summary:

Principal estate:

Amount of inventory	\$15,764 72
I credit her as follows:	
Chattels received by the widow.....	\$ 47 25
Moneys retained by the widow.....	168 00
Paid for insurance on estate property.....	13 35
Referee's fees and expenses on sale of Garrabrant property	46 00
	<hr/>
	274 60
Leaving a balance of the principal estate of.....	\$15,490 12

—Subject to other allowances for the expenses of foreclosing the Emily Garrabrant and Amelia Snedeker mortgages, to be determined and adjusted on the settlement of the decree herein.

As against the balance of this principal estate, the executrix is entitled to credit for the following securities and properties in her hands:

Mortgage of Gurnee	\$1,000 00
Mortgage of Sipple	1,500 00
Mortgage of Baker	100 00
Mortgage of Hamilton	500 00
Mortgage of John P. Garrabrant	300 00
Mortgage of Hedges	4,000 00
Mortgage of Green	500 00
Mortgage of Scott	300 00
Mortgage of Wagonhoffer	1,000 00
Mortgage of Hines	1,500 00
Mortgage of Gerow	1,500 00
Deposit in Irving Savings Bank.....	10 36
Deposit in Seaman's Savings Bank.....	252 62
Garrabrant place, bought in	338 95
Snedeker place, bought in	1,500 00
	<hr/>
	\$14,301 93

—Leaving a balance of uninvested funds of the principal estate of \$1,188.19, subject to the deductions for the foreclosure expenditures aforesaid, and the lawful commissions of the executrix, and the proper costs and expenses of this accounting.

As to the interest or income estate, I find that the executrix has received the following sums from the following securities and sources: Scott mortgage, \$135; Green mortgage, \$240; Emily Garrabrant mortgage, \$20; Hedges mortgage, \$1,678; John P. Garrabrant mortgage, \$74; Garrison mortgage, \$6; Baker mortgage, \$50; Snedeker mortgage, \$450; rent of Snedeker place, \$98; Gurnee mortgage, \$480; Sipple mortgage, \$720; Filey mortgage, \$90; Wagonhoffer mortgage, \$420; Murphy mortgage, \$24; Hines mortgage, \$630; Gerow mortgage, \$135; interest accrued on deposit in Seaman's Savings Bank, \$242.12; and interest accrued on deposit in Irving Savings Bank, \$103.42; making the total income, \$5,595.54. It is admitted by the widow and contestant, to whom the income is payable—and her receipt therefor is filed—that all of the interest was paid over to her during the years 1883, 1884, 1885 and 1886, to the amount of the respective sums of \$75, \$621, \$812 and \$752, and that thereafter, in the years 1887, 1888, 1889 and 1890, interest to the amount of the respective sums of \$300, \$250, \$250 and \$200 were paid over to her, making an aggregate of \$3,260, which, with the sum of \$560, of interest due on the Hedges mortgage at the time of the taking of the inventory, and which seems to have been paid over to the widow, as she admits, under a misapprehension, and which I think should be charged against her, makes an aggregate of payments out of the income estate of \$3,820, leaving a balance of income of \$1,775.54. In making these charges against the executrix, I have charged her with the receipts which she admits in her testimony of November 20, 1891, and shall allow an amendment of the accounts so as to take in these additional receipts, and also to permit credits for the expenses of the two foreclosure suits. These computations and items will be open to correction on the settlement of the decree.

Upon the claims of the executrix and widow, respectively, there is a large difference as to the payment made by the former to the latter, of income, during the years 1887, 1888, 1889 and 1890. The executrix testifies that she paid Mrs. Gerow the

whole of the income, but she produces only one or two vouchers for such payments, and confesses that she took no others. The contestant objects to the allowance of any payments for which vouchers are not produced. There is no evidence of the payments having been made, beyond the admissions of the widow, by the receipts which she has presented and filed, except the testimony of the executrix alone. It is true that two or three payments have been testified to by the witness Arthur Gerow, but they do not go beyond the amount that the widow admits in her receipt. The question is thus presented whether or not this executrix can be credited, in the absence of vouchers, for further payments, without evidence in addition to her own testimony. Section 2734 of the Code of Civil Procedure provides that "upon an accounting by an executor or administrator the accounting party must produce and file a voucher for every payment, except in one of the following cases." Then follow two subdivisions giving these exceptions. No question is raised under subdivision 1. Subdivision 2 is as follows:

"If he proves by his own oath, or another's testimony, that he did not take a voucher when he made the payment, or that the voucher then taken by him has been lost or destroyed, he may be allowed any item, the payment of which he satisfactorily proves by the testimony of the person to whom he made it, or if that person is dead, or cannot, after diligent search, be found, by any competent evidence, other than his own oath or that of his wife."

Here no vouchers were taken. The executrix so confesses. The widow—the contestant—to whom the payments were made, denies the payments, beyond the amounts stated in her receipt. There is no evidence of the payments, given by any person, nor any evidence, from any source, of further payments than those specified in the widow's receipt, except the testimony of the executrix alone. As to her, the statute says the "competent evidence" must be "other than her own oath." If this section of the Code is to be given force, I see no way to allow the executrix these further credits. Its language is so specific that in a case so closely drawn as this the credits cannot be allowed without

holding directly against the words and spirit of the statute requiring the production of vouchers. The statute says, "must produce and file a voucher for every payment, except," etc. The following authorities sustain this view: *Tickel v. Quinn*, 1 Dem. Sur. 425; *In re Rowland*, 5 Dem. Sur. 216; *In re Topping's Estate* (Sup.), 14 N. Y. Supp. 495-598; *In re Taft's Estate* (Sup.), 8 N. Y. Supp. 282, 283; *Willcox v. Smith*, 26 Barb. 316; *In re Hertfelder's Estate*, 1 Law Bull. 96. In *Re Langlois' Estate* (Surr.), 14 N. Y. Supp. 146, the learned surrogate allowed payments without the production of vouchers, and certainly went to the margin in so doing. He does not, however, as I understand his opinion, take the position that a surrogate may override the express words of the statute, upon his own convictions of justice, where the provisions of the statute as to the requisite evidence have not been complied with. If such were his determination, I should dissent from the same. He says: "My own belief is that the admission in the argument by the attorney for the objector, that the account is correct, is a complete waiver of the objection. However, I do not place my decision on that ground." In speaking further of the proof, he says: "It may not be a literal compliance with section 2734, but the evidence admitted, and the practical acquiescence of the contestants in the correctness of the items, convinces me that justice demands their allowance."

I am therefore led to believe that the learned surrogate found in the case competent evidence, other than the oath of the executor or administrator, and in that event, the case is not an authority that such payments can be allowed without vouchers, except by compliance with the other provisions of the statute, showing an exception therein provided for. If a surrogate can substitute his own sense of justice in place of that of the Legislature, as embodied in the rule prescribed by this section of the Code, and determine that vouchers need not be taken, then the rule is practically annulled. The wisdom of the rule is apparent. It puts upon the trustee the duty of taking vouchers for his payments. He is given a trust fund, and he should take upon him-

self the burden of showing that he has disposed of it according to his trust. It is no hardship to require of him that he should take and produce vouchers showing what disposition he has made of the fund. Payment is regarded, in law, as an affirmative matter. The rule, when applied to this case, shows it to be a just and wise one. This executrix was dealing with a very old lady—one who cannot read or write. She was therefore, in a great measure, at the whim or purpose of the executrix, as to payments. In case of death, either party would be in the power of the other. The Legislature, no doubt, in the enactment of this section, took full notice of the inequities and injustices that might occur, and formulated this statute, embodying the rule which would best serve the interests of justice; and, this being so, it seems to me that a surrogate has no right to substitute his own rule in place thereof. He should follow it, in its letter and spirit, in the absence of a compliance with the requirements thereof by the accounting party, and disallow such alleged payments. In the case of *Rose v. Rose*, 6 Dem. Sur. 26, cited by the counsel for the executrix, the learned surrogate held “that the rule was stringent, that beneficiaries may be protected from possible dishonesty of those acting in a fiduciary capacity;” and yet he decided that, where the “contesting party himself calls and examines the executor as to such payments, a different question arises.” It seems to me that this is ingrafting upon the statute another exception to the rule there laid down. I think it fair to presume that the Legislature embodied all of the exceptions therein, intended to be available. In fact, the section expressly says, “other than his own oath,” and yet the decision of the learned surrogate would make the executor’s “own oath” sufficient. I do not mean to hold that this statutory right may not be waived by a contestant, but it seems to me that, to constitute a waiver of the same, something more than questioning the accounting party as to payments is necessary to constitute a waiver of this statutory right. Section 2734 of the Code is a modification of the former statute, relaxing the rule in favor of the representative of an estate under certain circum-

stances, to prevent injustice being done, and to thus remove a serious obstacle to the assumption of such trusts. Decisions of the courts, indicating such modification, no doubt led to this modification. It is reasonable to suppose that the Legislature has, by the exceptions set forth in this section, relaxed the rule to the required extent to do no injustice to an executor or administrator, until future experience indicates a further modification. This power is not conferred upon surrogates. There is no proof of the extent, in the aggregate, of payments under \$20 each, and, as the payments allowed are far in excess of the \$500, that sum might be allowed where vouchers are not produced, but no further credit can be allowed for such payments. It is quite probable that the receipt of the widow does not express the exact amount of the payments to her. It is all, however, that she concedes. It may be that an injustice will be done the executrix, in disallowing further payments, but, if so, it is due to her own carelessness and negligence. She is an intelligent woman, of some business experience and prudence; and ordinary care indicated to her that, in order to make a proper showing of her disposition of the estate, she should have provided herself with some writings in verification of her payments.

The evidence shows that the executrix has deducted 5 per cent., as her commissions, accordingly as she paid over the moneys. This is not only in excess of her legal commissions, but she had no right to retain the same until judicially allowed. *In re Butler*, 1 Con. Sur. 58-70, 9 N. Y. Supp. 641, and cases there cited. The same will be adjusted by the decree. Let a decree be presented for settlement and entry; costs to be taxed and allowed at such time.

In re GOETSCHIOUS' ESTATE.

(2 Misc. Rep. 278.)

(Surrogate's Court, Rockland County, Filed February 13, 1893.)

1. EXECUTORS—ACCOUNTING—REAL ESTATE.

A testator devised and bequeathed to his wife, the use, occupation, income and profit of all his real and personal estate for her life, and directed that two of his sons (also named as his executors) should cut, haul and prepare for burning, firewood sufficient for her use. No duties were charged upon the executors with respect to the application of the income. *Held*, that the gift of the income of the real estate to the wife created an estate in the realty itself, and that the executors were not bound to account for the income of the real estate, or as to the cutting of wood and timber.

2. SAME—PERSONAL ESTATE.

In such case the executors retained the custody and management of the personal estate. *Held*, that if the income was collected by them without power under the will, they were only liable individually, and the court had no power to entertain an accounting therefor.

3. SAME—PERSONAL ESTATE—INCOME.

The executors invested part of the personal estate and used the remainder for their individual purposes. They paid the widow the income of the investments, and for legal interest on the moneys expended for their own use they paid her with cash, goods from their store, and by paying taxes for her. The evidence of witnesses other than that of the executors was given of payments in money and kind to the widow, who, it was also shown, paid sometimes for goods received from the executors. *Held*, that even if the latter were accountable for the income of the personal estate, the evidence was insufficient to charge them with any balance of income for which they were liable to pay the widow or her executors.

4. SAME—LIABILITY FOR PRINCIPAL.

One of the executors died during the widow's life. *Held*, that the survivor was accountable for the principal personal estate, except as to the value of articles of personal property which he placed in charge of the widow for her use, and which were lost by ordinary use and wear.

5. SAME—SURVIVING EXECUTOR—CREDIT.

The decedent executor had purchased part of the personal estate, for which he did not pay. *Held*, that as he had an equal right to the custody of the property of the estate, the surviving executor was not liable for the purchase price.

6. SAME—CREDIT FOR INTEREST.

When the executors could, out of moneys in their hands, have paid off the amount of a note due by testator, within a reasonable time after they entered upon their administration of the estate, they will not be allowed for accruing interest paid on the note.

7. SAME—COSTS OF ACCOUNTING.

An item for legal services on the accounting cannot be properly charged in the account. Such is a matter for adjustment upon the allowance and taxation of costs in the proceeding.

Judicial settlement of executor's accounts.

Snider & Hopper, for executor; Arthur S. Tompkins and D. D. Sully, for contestants.

WEIANT, S.—The testator, Harmon Goetschius, died on or about August 19, 1859, leaving a last will and testament, which was admitted to probate by the Surrogate's Court of this county on or about November 28, 1859, and letters testamentary thereof were thereupon issued to the executors therein appointed, the accounting party hereto, John H. Goetschius, and one George Goetschius, two sons of the testator. The executors caused an inventory of the personal estate of the deceased to be made and filed in said surrogate's office on the 19th day of December, 1859, showing assets amounting to \$2,282.10. The two executors entered upon the administration of the estate, and continued therein together until the death of George, in the year 1870, since which time the accounting executor has solely acted in such administration. The widow of the testator, Fanny Goetschius died on or about April 19, 1891, leaving a last will and testament, which was thereafter, on May 25, 1891, proved, and letters testamentary granted to Stephen Van Orden and John R. Wanamaker, as executors thereof. The testator by his will,

by request and devise, made the following provision for his widow:

“I give, bequeath and devise to my beloved wife, Fanny, the use and occupation, income and profit of all my real and personal estate, to have and to hold the same for and during her natural life; and I do further order and direct that my sons, John Henry and George, shall cut, haul, and prepare for burning, firewood sufficient for her use; and, further, it is my wish and desire that she remain in the house we now occupy, but if she prefers to take up her residence with any other person or place, she is at liberty to do so; and she is at liberty to surrender her claim, or any part thereof, to my estate to my children, if she thinks proper; and after her death I give, devise, and bequeath my real and personal estate to my children and grandchildren in manner and form following, to wit.”

Here follows a devise of a parcel of land to his daughter Catherine; a devise to his sons, John Henry and George, of the remainder of his real estate in the town of Ramapo; a bequest of the sum of \$800 to Catherine Louisa, the daughter of the testator's deceased son, Stephen, to become due and payable when she shall arrive at the age of 21 years, but if the testator's wife, Fanny, is living at that time, then to become due and payable to her one year after the death of his said wife; a bequest of \$100 to a grandson, Harmon Goetschius Bogart, together with certain specific articles of personalty; a bequest to Elizabeth Bogart and Harmon Goetschius, children of the testator's deceased daughter, Maria, each of \$500, to become due as they respectively arrive at the age of 21 years, or, if the testator's said wife is then living, then to become due one year after her death, and in certain contingencies to the survivor; a legacy of \$100 to Henrietta, the widow of testator's son, Stephen; a devise and bequest of the portion of the estate of George M. Goetschius, deceased, which the testator expected to receive on the distribution of that estate, to his daughter, Catherine, and his two sons, John and George; and a devise and bequest of all the rest, residue and remainder of his estate to his three children, Catherine,

John and George, and his grandchildren, Catherine Louisa Goetschius, Elizabeth Bogart and Harmon Goetschius Bogart, to be equally divided between them, share and share alike. It thus appears that the executors, as such, are given no authority or control over the real estate of the testator; and the consideration and investigation of the income or profits arising therefrom, and disbursements on account thereof, may be dismissed from this accounting. Those are matters to be adjusted between the individuals to whom the real estate was devised, respectively, or their legal representatives. The executors, as such, were not clothed with any duty or authority as to the same. A gift to the testator's widow of the rents and income of the real estate for life creates an estate in the realty itself, and, if no duties are charged upon the executors with respect to their application, no estate or trust is created in them in respect thereto. *Macy v. Sawyer*, 66 How. Pr. 381; *In re Blauvelt*, 131 N. Y. 249, 30 N. E. Rep. 194; *In re Blow* (Surr.), 11 N. Y. Supp. 193. As to the cutting of wood and timber from the lands devised by the testator, it also follows that this court has no jurisdiction to hear or determine the same. That is an individual matter between the devisees and the executors in their individual capacity. As to the personal estate, no duty seems to have been devolved upon the executors until after the death of the widow, and then only to make distribution of the same in accordance with the directions of the will, after payment of debts and burial expenses, which must necessarily have precedence. During the widow's lifetime, the "use and occupation" of all of the estate, real and personal, are given directly to the widow. No direction is given to the executors in reference to the same. They are not clothed with any express trust to receive and apply the income thereof, for the same is given directly to the widow. It seems, however, that title to, and right of custody of, the personalty, where the contrary is not expressly provided, is primarily in the executors, for the purpose of keeping and protecting the same for final disposition in accordance with law and the directions of the will. There is a species of trust attached

to every executorial office, and as was said by the chancellor in *Bowers v. Smith*, 10 Paige, 199, "the executor always takes the legal title to the personal estate of the testator as a trustee." *In re Shipman's Estate* (Sup.), 6 N. Y. Supp. 276. "But there is a wide difference between the trust which is attached to the executorial office and an active trust founded upon the creation of a trust estate. Here there is no trust estate, no active trust, and no testamentary trustee. The duty of the executor, as such, continues until the falling in of the life estate. This is the settled rule as laid down in a long line of cases." *Id.*, and cases there cited. "When a life estate is bequeathed in a sum of money with remainder over, the legatee is entitled only to the income, and the principal, subject to the life estate, belongs to the remainder-man; and, unless otherwise directed by the will, it is the duty of the executor either to invest the money, and pay the interest to the first legatee during life, and preserve the principal for the remainder-man, or, on paying it over to the legatee, to require security from him for the protection of the remainder-man in respect to the principal." *Smith v. Van Ostrand*, 64 N. Y. 278-282. "In such a case there is no other trust than the law created and vests in the executors. They take the legal title to all personal property. They must convert it into money, pay debts, expenses, and specific legacies, if any; and, as they are bound to execute all the provision of the will, they are charged with a duty, as it were, to A. and B. They must give to A. what belongs to him, and then to B. what belongs to him." *Livingston v. Murray*, 68 N. Y. 485-492.

The executors here having retained the custody and management of the personal estate, the executors of the will of the widow claim that they are accountable for the same, as executors, for both principal and income. I am not fully convinced that such contention is well founded. If the income was collected by them without power under the will, then they become liable individually, and this court would have no jurisdiction to entertain an accounting therefor. *In re Cooley*, 6 Dem. Sur. 77, and cases there cited; *In re Blow* (Surr.) 11 N. Y.

Supp. 193. But if it be assumed that the executors, as such, are here accountable for the income, upon the whole case it does not appear that they have been shown to have any balance thereof in their hands. The testimony discloses that the personal estate has been in part invested and in part used and applied to the individual purposes of the executors. They are chargeable with such interest as the evidence—which is without conflict—discloses that the investments earned, as well as for all profits realized on the sale or exchange of the securities, for they cannot make any individual gain from the trust funds. *In re Bntler* (Surr.) 9 N. Y. Supp. 641. For such portion of the funds as they used for and applied to their individual benefit, they must be charged with the legal rate of interest then prevailing. It is not a case for charging compound interest, under the circumstances. *In re Kennedy* (Surr.), 9 N. Y. Supp. 552. This income, however, was payable to and belonged to the widow. The accounting executor claims that all of it was paid to her in her lifetime, as the same was collected, either in cash, coupons, payments in her behalf, or by goods which she received from his store. But three receipts, however, are produced which show payments of interest collected. These were given in 1864 and 1865, and are for interest accrued on savings bank deposits and a bond and mortgage. The surviving executor testified to his having paid the widow all income received by them, and, for the interest lawfully due the widow from the executors for the funds applied to their personal use, that they paid her with cash, goods from their store, and by paying taxes for her at her instance, which she, as life tenant, was bound to pay, and produced receipts showing such payments. The executor is somewhat corroborated by other witnesses, who knew of payments made to the widow, and who knew of her obtaining goods from the executors' store. Sometimes the widow paid for goods she received, which lends an inference that the executors had paid her all accrued interest, for she would most probably not have paid for any goods if the executors were indebted to her for income to which she was

entitled. The executors do not seem, at least for many years, to have kept any accounts of their transactions with the widow, and the evidence is so general and indefinite that no satisfactory conclusion can be reached. It appears, however, even assuming that the executors, as such, are accountable for the income of the personal estate, that the evidence is insufficient to charge the executors with any balance of income for which they were liable to pay to the widow, or now to her executors. Again, it may be that all liabilities for such income, collected more than six years prior to the widow's death, are barred by the statute of limitations. *Foster v. Town*, 2 Dem. Sur. 333; *In re Nicholls* (Surr.) 8 N. Y. Supp. 7; *Mills v. Mills*, 115 N. Y. 80, 21 N. E. Rep. 714; *Brooks v. Brooks*, 4 Redf. Sur. 313; *In re Dunham* (Surr.), 6 N. Y. Supp. 563; *In re Clayton* (Surr.), 5 N. Y. Supp. 266; *Roberts v. Ely*, 113 N. Y. 128, 20 N. E. Rep. 606.

As to the principal personal estate, the surviving executor is accountable for the same. In his inventory he charges himself with \$2,280.10 of assets. As against this, he is entitled to credit for the \$8.75 of accrued interest paid the widow; also, the value of the articles of personal property which he placed in the charge of the widow for her use, to which she was entitled under the will, as the same appears to have been lost by ordinary use and wear by her, except the horse, bought by the executor George Goetschius for \$45, and for which he never paid. As that executor had an equal right to the custody of the funds and properties of the estate, I do not think, under the authorities, that the accounting executor is liable for that item. *In re Demarest* (Surr.), 9 N. Y. Supp. 292. As to the credit in Schedule C, for the payment of \$150 for interest upon the \$100 note of the testator, held by George J. Snider, I do not consider that the same is allowable. The executors had moneys in their hands out of which the note should have been paid and discharged within a reasonable time after they entered upon their administration of the estate, and they could not legally fail so to do, and charge the estate with the ac-

cruing interest for the long period of time that has since elapsed. *In re Babcock*, id. 554. The item of \$15, credited in the same schedule for legal services on this accounting, is not properly there. That is a matter for adjustment upon the allowance and taxation of costs in this proceeding. For the balance of the principal of the estate, the accounting executor is chargeable with such interest or income as may have been earned or accrued thereon, where invested, since April 19, 1891, the date of the death of the widow; and as to the remainder, which seems to have been appropriated to their own use by the executors, the accounting executor must be charged with legal interest from the same date. The increase or decrease which resulted on the sale or exchange of securities is chargeable to the principal estate. *In re Lawrence* (Surr.), 7 N. Y. Supp. 332. The credit of \$500 in Schedule B, being one-half of the \$1,000 which the executors used in their business, cannot be allowed. That was money of the estate which went into their partnership business, and, so far as this estate is concerned, both became liable for the full sum appropriated, as the money was so used with the assent of both.

The inventory is not before me, and it may be that the amounts and values herein stated are incorrect, and therefore, upon the settlement of the decree, the same may be therein corrected. I have simply indicated the rules in conformity to which the accounts must be adjusted and settled by the decree. The amount for which the accounting executor thus appears to be liable must be decreed to be applied by him, first, in payment of the costs and expenses of this accounting; then the burial expenses, if any, unpaid; next, in discharge of the debts of the testator; and the remainder to the legatees, agreeably to the provisions of the testator's will.

In re GOETSCHIOUS' ESTATE.

(3 Misc. Rep. 155.)

*(Surrogate's Court, Rockland County, Filed March, 1893.)***1. EXECUTORS—ACCOUNTING—COSTS.**

An executor who has been forced to account by process of the court, and who has failed to sustain many items thereof, will be only allowed costs as if there were no contest.

2. SAME—CONTESTANTS—COSTS.

Contestants who have forced an executor to account, and who have successfully contested nearly all the items of his account, will be allowed out of the estate, if not against the executor personally, costs of compelling the executor to account, for time occupied in the trial, and a contest fee, but not for time occupied in preparing for trial.

3. SAME—INCOME—COSTS.

When there is a doubt as to whether the executor, as such, received and disbursed the income of personal estate, during the continuance of a life estate, and that even if he had, there was no balance due by him on foot of such income, costs will not be allowed the executor or the contestant.

4. SAME—PRINCIPAL—COSTS.

If such costs were allowed, they could not be charged against the principal of the estate.

5. SAME—CONTEST.

The executor's costs in such case will not be awarded against the contestant, when the executor kept no account of the income fund.

Application on settlement of decree on executor's accounting, as to costs.

Snider & Hopper, for executors; Arthur S. Tompkins and D. D. Sully, for contestants.

WEIANT, S.—My decision of the issues in this matter was filed on February 13, 1893. 23 N. Y. Supp. 970. I am now required, for the purpose of the settlement and entry of the

decree, to determine the questions as to the allowance of costs, and directions as to how, and by whom, the same should be paid. The counsel for the executor presents a bill, specifying the items thereof, asking for \$220 costs and \$11.70 disbursements. The counsel for the contestants submit a bill, claiming \$155 costs, and \$3.22 disbursements. Section 2558 of the Code of Civil Procedure provides that "the award of costs in a decree is in the discretion of the surrogate, except in one of the following cases." Then follow the exceptions, none of which apply to a matter like the one under consideration. *In re Reeves* (Sup.), 1 N. Y. Supp. 17. The opinion of Mr. Justice DANIELS in the case cited may be read by practitioners to their edification, and to the relief and satisfaction of surrogates. By section 2557 of the Code it is prescribed that, "except where special provision is otherwise made by law, costs awarded by a decree may be made payable by the party personally, or out of the estate or fund, as justice requires." It thus specifically appears that the power of the Surrogate's Court is broad as to awarding costs to parties, and from whence and by whom the same may be decreed to be paid; and the inquiry is, having in mind these statutory provisions, to whom should costs be given, if any, and from what source and by whom should the same be paid, upon the facts and circumstances disclosed upon this accounting? In order to bring about an accounting, the persons interested in this estate were obliged to take compulsory proceedings to compel the executor to render the same. The executor had been commissioned as such in 1859, and had at no time rendered an account of his proceedings. When thus forced by process of the court, he initiated a proceeding for a judicial settlement of the estate, and filed his account. He did not therein, as is usual in these proceedings, charge himself with the assets set forth in his inventory, but omitted therefrom moneys which he had himself used, as well as his co-executor, in their copartnership business. He neglected to pay an admitted debt of his testator, and asked credit for an aggregate sum of \$150 interest that he had paid thereon during the years of his executorship. He charged him-

self with but \$1,500 of assets, and rendered no statement as to the balance thereof. To these accounts the contestants interposed objections, all of which have been sustained, except the one to the \$100 claim against the estate of one Esler on a note, and which the executor had not paid.

The contest has been upon items as to which the executor should have voluntarily accounted and charged himself, and as to which he thus invoked a contest, and was adjudged in the wrong. He cannot be justified in doing this, nor in fairness ask that the estate shall reimburse him for his expenses. No such rule can prevail. It would be contrary to the statute, and encourage every person acting in a fiduciary capacity to involve the trust estate in unnecessary litigation and expense, to gratify personal animosities and differences, without the risk of pecuniary harm or hurt to himself. It would be encouraging laxity and negligence in the administration of such estates, where the law requires care and vigilance.

The bill of costs of the executor is allowed to the following extent: \$20 for the two days charged for preparing his accounts, \$25 for proceedings as if there were no contest, and \$11.70 for his disbursements—a total of \$56.70, which may be made payable out of the estate. The bill of costs of the contestants other than Catherine L. Smith and Henrietta Goetschius, who simply appeared and interposed objections, but who have taken no part in the contest, and the executors of the will of Fannie Goetschius, deceased, is allowed as follows: Contest fee, \$70; three days occupied in the trial, \$30; for proceedings to compel the executor to account, \$25; disbursements, \$3.22—total, \$128.22. The item of \$30 for three days necessarily occupied in preparing for trial is one that is allowable only to an accounting party. Code Civil Pro. section 2562; *In re Weeks*, 5 Dem. Sur. 194-211; *In re Peyser*, id. 244; *In re Reeves* (Sup.), 1 N. Y. Supp. 17. This allowance I also make payable out of the estate, although I might well charge it against the executor personally. *In re Williams* (Surr.), 2 N. Y. Supp. 669; *Estate of Harnett*, 15 N. Y. St. Rep. 725. The remarks

of the learned surrogate in his opinion in *Re Williams* are quite applicable to the matter here being considered. The following authorities in principle sustain my determination: *In re Woodward*, 13 N. Y. St. Rep. 161; *Estate of Wilcox*, 11 Civil Pro. Rep. 115; *In re Williams, supra*; *Estate of Harnett*, 15 N. Y. St. Rep. 725; *Walton v. Howard*, 1 Dem. Sur. 103. In *Re Woodward*, 13 N. Y. St. Rep. 161, where an executor had failed to keep his accounts distinct from his dealings with others, and in such manner that persons interested in the estate could inspect them at any time if they desired to know its standing and condition, it was held that the executor could not be allowed for his own time and expense, or for the expenses of his counsel, upon the accounting, more than would be reasonable for the time and labor spent in establishing an account kept and made out in such manner as the law requires. In *Re Williams, supra*, it was decided that where an accounting executor, or his attorney, by neglect delays the same, and items of the accounts were, upon examination, found erroneous, the entire cost of the proceeding will be charged upon the executor personally. It must be remembered that, according to the whole line of the authorities, the allowances in these proceedings, under the provisions of the Code as to costs and disbursements, are made to the parties, and not to their attorneys, and are not intended to be the measure of compensation as between the attorney and client. As remarked by Surrogate Ransom in *Re Willett* (Surr.), 2 N. Y. Supp. 668:

“It may be that the allowance granted by me by way of costs is not sufficient to properly compensate the attorney. In that event he should look to his clients, the trustees, for such compensation, and, if proper, they may be allowed the same upon a judicial settlement of their account.”

While the accounts of the executor contain no statement of the income of this estate, to which the widow was entitled under the will of the testator, and no allegation appears in the answer claiming that the executor should be charged with, and should account for, the income estate, yet as between the accounting executor and the executors of the will of the widow there has

been an examination into his receipts thereof and payments therefrom. That subject has been disposed of by my decision upon the main question, from which it appears that there was no balance of such income in his hands at the time of the widow's death. That being so, and for other reasons, among which is the doubt as to whether the executor, as such, received and disbursed said income, and consequently as to whether or not he is accountable therefor in this proceeding for the same, costs as to that branch of the accounting are not awarded to either party. If allowed the costs therefor, they would not be charged against the principal estate in the executor's hands. The principal estate cannot be charged with the expenses of administering or the costs of the settlement of the income estate. Each must bear its proper charges and expenses of administration. *Dannat v. Jones*, 2 Dem. Sur. 602. But if it be claimed that the executors of the estate of the widow have made a contention in which they have been defeated, and that therefore the accounting executor should be awarded costs against them, payable out of her estate, still, I think the executors of the widow's estate have a full and just answer to such claim, in the fact that the executor kept no accounts whatever of this income fund, whereby the widow or her personal representatives might inform themselves as to the relations existing as to such fund between the respective parties. *In re Woodard, supra*; *Estate of Wilcox, supra*. The widow's executors are in duty bound to seek information as to whether the accounting executor was indebted to the widow or her estate for any balance of such income, and the executor, by his neglect to comply with the duty which the law imposed upon him to keep accounts and vouchers of his transactions, so as to disclose the state of his accounts or dealings with the widow, without legal investigation, has no reason to complain if costs be denied him, and the widow's estate relieved from such expense, which his failures and conduct brought about.

In re RICHARDSON'S ESTATE.

(2 Misc. Rep. 288.)

*(Surrogate's Court, Westchester County, Filed February, 1893.)***1. EXECUTORS—WHEN NOT LIABLE AS EXECUTOR DE SON TORT.**

An executrix prior to her death placed certain of the funds of the estate in the hands of one who was, after her death, appointed executor. *Held*, that in respect thereto the latter could not be treated as an executor *de son tort* (2 R. S. 81, sec. 60), and that the estate of the executrix was liable to any profits earned by the funds so placed, prior to her death.

2. EXECUTORS—OUTSTANDING ASSETS.

An executor is not obliged to charge himself with the amounts of insurance policies still running, nor with interest on a fund held by a trust company in liquidation, nor with collaterals to loans out of the estate made to himself, as they are not cash in hand or its equivalent, but he should set them forth as outstanding, in schedule G.

3. EXECUTOR—INTEREST ON FUNDS LOANED TO HIMSELF.

An executor is chargeable with profits from the use of money belonging to the estate, as also any bonus he may have received for the loan of the funds, and if such should be less than the legal rate of interest, he is chargeable with the deficiency.

4. SAME—LIABILITY FOR ACTS PRIOR TO APPOINTMENT.

An executor and trustee is liable for dealings with the estate prior to his appointment up to the date when he assumed control of the funds.

5. SAME—COMMISSIONS.

A credit for commissions will be disallowed, as they cannot be taken prior to accounting.

6. SAME—BOOKKEEPER'S CHARGES.

An executor should keep his own accounts when they are simple, and he will not be allowed for bookkeeper's charges, especially when any complexity arose by his own unwarranted dealings with the funds.

7. SAME—REFEREE.

An addendum to the report of a referee, made subsequent to its submission, will be disregarded.

Petition by Anna P. R. Kirkland, a legatee, for the judicial settlement of the accounts of T. C. Richardson, styled in the petition "substituted trustee," who was appointed executor of the estate of Richardson, deceased, in lieu of the widow of deceased, the sole surviving executor and trustee under the will.

The widow died on January 29th, 1890. Prior to her death she had placed certain of the funds of the estate in the hands of T. C. Richardson, her son, who, it was claimed, was chargeable with the profits thereof prior to her death. On June 6th, 1890, T. C. Richardson was appointed substitute trustee and executor. He borrowed moneys of the estate and secured same by collateral. In 1892 an arbitrator, who had been appointed in 1888 to state the account between the executrix and other parties interested, and whose account it was agreed should be final, filed his report bringing the account down to January 29th, 1890, the date of the executrix's death.

After filing the report, the arbitrator filed an addendum thereto relating to a fund held in trust for the petitioner. Other facts appear in the opinion.

Clarke & Culver, for petitioner; W. H. Sloan and F. X. Donoghue, for T. C. Richardson; S. E. Duffy, for Edward C. Richardson, a legatee.

COFFIN, S.—It appears to be conceded that the starting point on this accounting is January 29, 1890, the date to which the referee brought it down. The sums of \$3,100 (call loan) and \$9,010.14 were placed in the hands of T. C. Richardson by the executrix prior to her death, and her estate is therefore liable for any profits earned by those sums prior to that event. In respect thereto this trustee or executor cannot be treated as an executor *de son tort*. 2 Rev. St. p. 81, section 60. The present executor is here called "substituted trustee," but in the order appointing him he is also styled "executor." It does not seem that there is any trust created by the will, now unexecuted, but

paying over the fund, except, perhaps, as to a portion of Mrs. Kirkland's share.

It is objected that the accounting party should have charged himself with the amounts of the life insurance policies now held by him, and still running, with the amount of the interest of the estate in the fund held in liquidation by the Farmers' Loan & Trust Company, and with certain collaterals to loans made to himself. As they were not cash in hand, or its equivalent, he properly omitted so to charge himself, but he should have set them forth in Schedule G. When he realizes on them, he may be called upon to render a further account.

The present trustee had no right to borrow money from himself, as such, to speculate with, and whatever profits he may have realized from the use of the money belongs to the estate, and he should be charged therewith. Any bonus he may have received for the loan of the fund also belongs to the estate. Of course, if he realized, in his speculations, less than the legal interest, he must be charged with the deficiency.

If T. C. Richardson is to be regarded simply as an executor and trustee, then it would seem his acts and dealings with the estate, from the date of the death of his mother, and prior to his appointment, as a mere common-law trustee, are reviewable here, like those of an executor *de son tort*; the order appointing him relating back to the time when he assumed control of the funds. While this may seem somewhat doubtful, still, in view of the fact that surrogates now possess as great powers on the accounting of trustees as of executors, it appears to be analogous in principle to the cases of *In re Faulkner*, 7 Hill, 181; *Farrell's Estate*, 1 Tuck. 110. If, therefore, claims exist in his favor, or against him, for any dealings with the estate prior to June 6, 1890, and subsequent to January 29, 1890, redress may properly be sought here.

The credit for "fee paid to T. Chesley Richardson, as trustee, \$100," presumably on account of his commissions, is disallowed, as it is well settled that the commissions cannot be taken prior to the accounting.

The items of credit claimed for payment of services of bookkeepers should be, and are, disallowed. Doubtless the gentlemen who rendered the services were abundantly competent experts, and were entitled to be adequately rewarded; but as a rule an executor should keep his own accounts, when they are as simple as they should have been in this instance, if the executor had not rendered them more complex by his unwarranted dealing with the fund, and, if he cannot, then he should pay for the work belonging to him to do, out of his own pocket.

The addendum to the report or award of the referee or arbitrator, having been made subsequent to its submission, must be discharged.

With the exception of the criticisms and their results, as above outlined, the account is approved, and a decree will be prepared accordingly.

In re GOVAN'S ESTATE.

(2 Misc. Rep. 291.)

(Surrogate's Court, Westchester County, Filed February, 1893.)

1. ADMINISTRATORS—FURTHER INDEBTEDNESS—INCREASE OF BOND

On an application by an alleged creditor of a decedent, whose will was probated in a foreign state, and the executors of which were appointed ancillary administrators here, to have the penalty of their bond increased so as to cover her indebtedness, the court cannot try the question of the alleged indebtedness, although disputed.

2. SAME—AMOUNT OF BOND.

Ancillary administrators having been appointed and duly qualifying (Code Civ. Pro. sec. 2667) by giving bond in \$120, being double the amount of a debt (\$60) alleged by them to be due by decedent to a resident in New York, the assets in this State being also alleged to be under \$100 in value, *held*, that the application of an alleged creditor to the extent of \$240 to have the bond increased to \$600 penalty should be denied, as the only object of the bond was to secure the creditors to the extent of the value of the assets.

The will of decedent, who died in Connecticut, was proved in

that State by his executors, Henry F. Smith and James H. Groom, who were thereafter appointed ancillary administrators here, on their petition alleging assets to the extent of \$100 in Westchester County, N. Y., and that decedent owed \$60 to a resident of this State, and on giving bond in the sum of \$120.

Subsequently Harriet Govan applied for an order that the penalty of the bond be increased to \$600, claiming that decedent owed her \$240. Denied.

I. J. Beaudrias, for petitioner; F. X. Donoghue, for ancillary administrators.

CORPIN, S.—This court cannot try the question of the alleged indebtedness, but must regard the claim of the petitioner, although disputed, as sufficient to entitle her to make an application of this character. Nevertheless the prayer of her petition must be denied. She asks for a bond in the penalty of \$600; the admitted debt being \$60, and her claim \$240, making \$300—the half of the proposed penalty. She does not claim that the value of the assets in this State exceeds \$100, which is the amount stated in the petition for the letters. Now, by section 2699 of the Code, before such letters can be issued, the persons to whom they are awarded must qualify as prescribed in section 2667, to wit, by giving a bond in a penalty not less than twice the value of the personal estate of the deceased, except that the penalty of the bond may, in the discretion of the surrogate, be in a sum not exceeding twice the amount which appears to be due from the decedent to residents of the State. This discretionary power was exercised in this case. It would seem that unless the surrogate exercise this discretion the penalty of the bond should be twice the amount of the value of the assets in this State, and then, in this case, the penal sum would have been \$200. It would be absurd to hold that the Legislature intended that where the amount of the assets was only \$100, and the amount of the debts \$5,000, the executors should give a bond in the penal sum of \$10,000. The amount of the penalty

of an administrator's bond is fixed, not with regard to the debts the intestate owed, but the value of his personal estate. The only object of the bond here is to secure the creditors to the extent of the value of the assets. The prayer of the petition is therefore denied, with \$10 costs of the motion.

In re TURFLER'S ESTATE.

(1 Misc. Rep. 58.)

(Surrogate's Court, Rockland County, Filed October, 1892.)

1. LEGACIES—ADVANCEMENTS.

The statutes of descents (1 Rev. St. p. 754, secs. 23-26) and of distributions (2 Rev. St. p. 96, secs. 75-77) as to advancements, only relate to cases of intestacy.

2. ADEMPION—BEQUEST OF RESIDUE.

Testatrix provided by her will that her property should be sold and the proceeds equally divided amongst her five children. After the execution thereof she made advances to them, and took a receipt from each which expressed that testator intended to advance each \$5,000. Three of the receipts were for the full sum of \$5,000, but two were for less than that sum. After testatrix's death, her executor, prior to an equal distribution of the assets, paid to each of the two children who had received less than \$5,000 the difference necessary to make up the \$5,000 which testatrix intended to give each in her lifetime. *Held*, that the payments so made were authoritatively made as advances or payments, to carry out the intention of the testatrix to equalize the distribution of her property among all of her children.

3. SAME.

The principle of ademption of a legacy is applicable to a bequest of residue.

4. SAME—DEVISE OF REALTY.

In such case the proposition that the rule of ademption is only predicable of legacies of personal estate, and is not applicable to devises of realty, does not apply, as the will devised the real estate to the executor in trust to sell the same and divide the proceeds, and in

any event, as the executor had received \$24,000 of personalty, and applying the rule of ademption to only a bequest of personalty, strictly such, the payments to the two children in question were properly made.

5. ESTOPPEL OF LEGATEE—PAYMENT AS ADEMPMENT.

When one of such residuary legatees gave her assent without qualification to the making of the payments so as to equalize the two children who had received less than \$5,000 with the other children, and withheld objections to the same being made, knowing that the same were being made, or were about being made, until the payments were actually made, and then first interposed objections, *held*, that such legatee was estopped from claiming that such payments were illegally and improperly made.

Judicial settlement of accounts of Jacob C. Turfler, executor of the last will and testament of Elizabeth Turfler, deceased.

Scott & Upson, for executor; T. C. Cronin and I. Newton Williams, for contestant, a residuary legatee.

WEIANT, S.—The testatrix, Elizabeth Turfler, died February 9, 1886, leaving a last will and testament, bearing date February 16, 1882, and a codicil thereto, bearing date October 28, 1885, and appointing her son, Jacob C. Turfler, the sole executor thereof. By her said will the said testatrix directed her funeral expenses and debts to be first paid. Secondly and thirdly, she made bequests of certain articles of personal property to her two daughters, Amy Williams and Cornelia R. Kroehl. Fourthly, she gave to her said daughter Amy Williams the right to use and occupy a house and lot, No. 583 St. Mark's avenue, Brooklyn, for five years from May 1, 1882, upon certain conditions as to the payment of repairs, taxes, etc., and with the right to purchase the same from the executor at any time within such period for the price of \$5,000, on certain terms therein prescribed as to payment and security. Said provision terminates with the following words: "But, if my said daughter Amy shall so purchase the said house and lot, she shall pay therefor the whole of said sum of five thousand dollars, and shall have no share with my other children in the purchase price

thereof, as hereinafter provided concerning any other property."

The testatrix then makes the following disposition of her property: "All the rest, residue, and remainder of my estate, whether real or personal, * * * I give, devise and bequeath to my said executor in trust, to sell the same * * * at public or private sale, and at such times and in such manner as he may deem best, but all (except the St. Mark's avenue house and lot above) within one year after my death, and the proceeds of such sales * * * to divide equally among my five children, namely, the said Amy Williams, the said Cornelia R. Kroehl, George C. Turfler, Jacob C. Turfler and Francis A. Turfler."

Here then follows a bequest and devise in case of the death of either child, and the testatrix then adds: "And my said executor shall make division of such proceeds among my said children or children and grandchildren as often as such proceeds of sales or accumulations of moneys in his hands shall amount to \$2,500."

The instrument then terminates with the appointment of the executor. By the codicil the testatrix makes only the following provision: "It being my intention to make a gift to my daughter Amy Williams of the property mentioned in the fourth paragraph of my foregoing will, and the expenses of that property in repairs, taxes, etc., since the execution of my said will, having been paid by me, I do hereby revoke and declare null and void the said fourth paragraph of my said will."

After the execution of her will, the testatrix made advances or loans, from time to time, to each of her said children, and on December 10, 1885, took from each of her said children, George C. Turfler, Jacob C. Turfler, Francis A. Turfler and Cornelia R. Kroehl a receipt or acknowledgment in writing, executed by each respectively and separately, and reciting in each substantially that "My said mother having determined to make gifts or advances to all of her children to the amount of \$5,000 each, * * * so that the said payments and loans may be treated as a gift or advance, this is to acknowledge that I have received from her the said sum of \$5,000 as such gift or advance."

The acknowledgment of George C. Turfler, however, recites that he has received only \$2,100, "on account and as part of such gift or advance of \$5,000," and that of Francis A. Turfler that he has received "from my said mother the said aggregate of \$2,420 on account, and as part, of said sum of \$5,000 so advanced, and to be advanced, to me." The daughter, Amy Williams, the only contestant herein, executed the following acknowledgment as to her advancements:

"Received, December 10, 1885, of Elizabeth Turfler, a deed from her to me of the property known as number 583 St. Marks avenue, in the city of Brooklyn, my mother, the said Elizabeth Turfler, having made gifts or advances to several of her children, and having determined to make such gifts or advances to all her children, equally to each child, the sum or equivalent of five thousand dollars, this receipt is an acknowledgment that I have received in the said property above mentioned the whole of such sum of five thousand dollars as such an advance to me."

George C. Turfler and Francis A. Turfler received no further payments or advances during the lifetime of the testatrix, except one of \$500 to George, on January 11, 1886, "on further account of the above-mentioned advance of \$5,000," making his aggregate payments \$2,600. After her death, and after the probate of her said will and codicil and the granting of letters testamentary thereof to the said executor, and about March 4, 1886, all of the children, or their representatives, held a conference as to the estate matters, and as a part thereof the matter of the intended gifts or advances of the \$5,000 to each child by the testatrix came under consideration, and the fact that neither Francis nor George had received their full \$5,000, Francis having received but \$2,420, and George the \$2,600, was acknowledged by all. The matter of completing these gifts or advances to them was discussed, and it was agreed by all, including this contestant, that these two brothers should receive an amount of money out of the estate which, with the amount which each had already received, would make the sum of the advances to each \$5,000. At least two subsequent meetings of said parties were

had, at which the contestant was present, and the matter of the payment to George and Francis of their respective balances of the sum of \$5,000 came under consideration. These latter meetings were held at the office of the counsel for the executor in New York City, about the respective dates of March 10 and April 15, 1886. About said 10th day of March the executor paid to George and Francis the respective sums of \$2,400 and \$2,580, as their respective balances of \$5,000, and took their receipts therefor. These items appear as credits in Schedule E of the accounts. About the same time the counsel for the executor prepared a writing reciting the facts, with reference to these gifts or advances of the testatrix, and that it was her intention, before her death, to make to each an advance or gift to the amount of \$5,000; that George and Francis had only been paid to the respective amounts of \$2,600 and \$2,420; that, although the will does not provide for payment to them of the remainder of such amount of \$5,000 to each, yet it is declared to be just, and it is the desire of the parties that such remainders be paid out of their mother's estate before any division of the same; and that the executor has, at their special request, and their promise of release to him, paid over the said remainders out of the moneys of the estate to said George and Francis; and then follows a release and discharge of the executor, and acknowledgment of the said payments by him, and an agreement to waive all objections to such payments upon the accounting of the executor. This writing is under seal, and executed by all the children except Mrs. Williams, and is in evidence as "Exhibit 4, May 24, 1892." As to what occurred, and what was said, as to the terms and conditions upon which such payments might be made to George and Francis by the executor, and said writing above should be executed by Mrs. Williams, there is a conflict of evidence. She contends that the payments were to be made, and such release executed by her, only upon condition that a certain Greenwood cemetery plot, constituting a part of the estate, should be conveyed to her by her said brothers and sister, while the executor claims that no condition was imposed, and

no such objection raised, until after he had made the payments agreeably to the consent of all, including Mrs. Williams, given at one or more of these conferences above mentioned. On or about April 15, 1886, the executor paid each child, including the contestant, the sum of \$2,500 on account of his or her distributive share of the estate, and so, again, on April 11, 1887, a payment to each of \$800.

The contestant now objects to the allowance of these two payments of \$2,400 and \$2,580, respectively, to George and Francis as credits in the executor's accounts, and contends that the same were wrongfully made and unauthorized. This presents the only question which is submitted to me for my consideration and determination. The counsel for the executor maintains that these payments were properly and legally made, and that the executor should be credited therefor, on these several grounds: (1) That the same were properly made as advances, pursuant to the provisions of the statutes of distribution and descents; (2) that they were authoritatively made as advances or payments, to carry out the intention of the testatrix to equalize the distribution of her property among all of her children; (3) that the payments were made with the consent of all of her children, including Mrs. Williams; that she was present when the payments were made, or had knowledge or information that the same were being made, and made no objection thereto, and that because thereof she is now estopped from claiming that the same were illegally and improperly made. It is my opinion that these payments cannot be sustained upon the first ground. The statutes of descents (1 Rev. St. p. 754, secs. 23-26) and of distributions (2 Rev. St. p. 96, secs. 75-77) as to advancements only relate to cases of intestacy. These statutes have thus been construed by the authorities. *Thompson v. Carmichael*, 3 Sandf. Ch. 127, cited with approval in *Clark v. Kingsley*, 37 Hun, 247; *Hays v. Hibbard*, 3 Redf. Sur. 28; Redf. Pr. (3rd Ed.) 583. My judgment is, however, that the payments are sustainable upon the second ground. The bequests to all of the other children of the testatrix were adeemed to the extent of

\$5,000 by the advances of the testatrix in her lifetime, and in the distribution of the estate the executor was authorized to pay to Francis and George these respective amounts in question, to equalize them with the advances to the other children, and then to equally distribute the balance. It is perfectly clear from the evidence that it was the express intention of the testatrix to make an equal division of her property among her five children. She so provides by her will; but after its execution she proposes, during her lifetime, to make an equal division of her property to the extent of \$5,000 to each. She carries out that purpose fully as to three of her children, one of whom is this contestant, Mrs. Williams, but fails as to Francis and George to the extent of these respective payments in question. To the extent, therefore, of these payments by the testatrix in her lifetime to each child, his and her legacy or bequest is satisfied. Courts of equity have always treated advances by way of portions as a satisfaction of general legacies given by a parent or other person standing in *loco parentis* to a child. Redf. Pr. (3rd Ed.) 583, and authorities there cited. Ademption is the extinction or satisfaction of a legacy by some act of the testator, which is equivalent to a revocation of the bequest, or indicates the intention to revoke, and the rule is applied where the testator is a parent of the legatee, or stands in *loco parentis*. The question of its application is made to depend upon the declared or presumed intention of the donor. *Burnham v. Comfort*, 108 N. Y. 535-539, 15 N. E. Rep. 710.

In *Benjamin v. Dimmick*, 4 Redf. Sur. 7. the learned surrogate says: "There can be no doubt that a legacy from a parent to a child may be deemed in whole or in part, and the rule thereof may be deduced from the elementary writers upon the subject, as follows: That where a parent bequeathes a legacy to a child, and afterwards, in his lifetime, gives a portion or makes a gift to, or a provision for, the same child, even without expressing it to be in lieu of the legacy, if the gift or provision be certain, and not merely contingent, if no other object be pointed out, and if it be *ejusdem generis*, then it will be deemed

an ademption of the legacy *in toto*, if greater than or equal to, and *pro tanto*, if less than, the provision by the will. The provision by the will is presumed to be a portion, because it is a provision from a parent for his child, and the subsequent gift of a portion is presumed to be a satisfaction of such portion given by the will, either wholly or in part;" citing authorities.

Where a legatee, subsequent to the execution of the will, received from the testator property in lieu of the legacy, the legacy is satisfied. *Snell v. Tuttle*, 44 Hun, 324-331. *Camp v. Camp*, 18 Hun, 217, is not in conflict with this principle. In that case it appears that the advances were made prior to the making of the will. It is claimed that this principle of ademption is not applicable to a bequest of residue; but while the earlier authorities seem to have so indicated, yet the later ones hold the contrary. In *Montefiore v. Guedalla*, 1 De Gex, F. & J. 93, Lord Chancellor CAMPBELL, writing the opinion, says (at page 99):

"It has been said that there cannot be an ademption where a testamentary gift is of the residue of the testator's property. This position rests upon no principle, and, if strictly acted upon, would produce great injustice. The doctrine of ademption has been established for the purpose of carrying into effect the intention of fathers of families in providing for their children, and of preventing particular children from obtaining double portions, contrary to said intention. The only reason for the exception is that a residue is uncertain, and may be worthless. * * * But if a testator, after directing his executor to pay debts, funeral expenses, and legacies, goes on to say, 'And whereas, I wish all the residue of my personal property to be equally divided among my three children, I direct that each of them receive one-third of the residue,' and afterwards he advances \$5,000 to a daughter on her marriage, or to a son to purchase a commission in the army, can there be any doubt that he meant this sum to be deducted from the one-third of the residue coming to the daughter or the son?"

Speaking of the cases to the contrary, he says: "The whole

of that class of cases has been swept away by *Thynne v. Glegg*, 2 H. L. Cas. 131." "Upon the whole [Lord CAMPBELL still writing], I think the question whether a gift or residue does or does not operate as an ademption or satisfaction must depend upon the intention."

The case of *Eisner v. Koehler*, 1 Dem. Sur. 277, was one of a bequest of the residuary estate, and the doctrine of advancements was applied. In *Hays v. Hibbard*, 3 Redf. Sur. 28, the learned surrogate holds that the principle of ademption does not apply to residuary legacies. He cites Rop. Leg. 376, wherein he says: "It is stated as a fourth exception to the general rule of presumptive advancement, where the bequest is uncertain in amount, that the devise of the residue, or of part of the residue, to a child, is not adeemed by a subsequent advancement upon the legatee's marriage," etc.

He also cites *Williams, Ex'rs*. These authorities I do not think sustain the general proposition. The authors cited were treating of the "presumption" of ademption where there is no intention of the testator expressed in the will or other written instrument. Such a case was *Hays v. Hubbard*, *supra*, and it may be that, resting alone upon presumption, the learned surrogate was correct in the conclusion he reached as to that case, but evidently the authorities he cited do not sustain the general proposition that the principle of ademption does not apply to the residuary legacies. The language quoted by him from Roper expressly shows that the author is speaking of "presumptive advancements." 2 *Williams, Ex'rs*, 1443, cited, is to the same effect, and holds that this presumption may be rebutted or confirmed of a different intention of the testator. In speaking of the ademption of residuary legacies in 2 *Williams, Ex'rs*, 1442, the author says: "It was formerly considered that where the bequest to the child is of a residue, or part of a residue, the subsequent advance cannot operate as an ademption, because such a gift cannot be considered as a legacy of a portion, which must mean a legacy of a definite sum; but a contrary doctrine is now established."

In *Hopwood v. Hopwood*, 7 H. L. Cas. 728, it was declared that the presumption of law is against double portions, and that where a sum of money is given by the will of the parent to a particular child, and a like sum afterwards secured by a settlement on the marriage of that child, there is a presumption in favor of the ademption of the legacy; and see *Leighton v. Leighton*, L. R. 8 Eq. 458. The American courts fully recognize the presumption against double portions. 2 Redf. Wills, 447. It is always a question of the intention of the testator. In this case the question does not rest solely upon presumption. The intention of the testatrix is clearly and explicitly made to appear; she intended that an equal distribution of her estate should be made, having in consideration a gift or advance to each child of the sum of \$5,000, in cash or other property. The receipts above mentioned, given by Francis and George, respectively, to the executor, show that each was to have an additional advance sufficient to make up the balance to each of the sum of \$5,000. It also appears, from a further receipt given by George under date of January 11, 1886, being shortly before the death of the testatrix, that she paid him \$500 "on further account of the above-mentioned advance of five thousand dollars." There is no doubt as to the intention of the testatrix. The counsel for the contestant claims that the rule of ademption is only predicable of legacies of personal estate, and is not applicable to devises of realty, and cites the case of *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. Rep. 710, as sustaining such contention. The case cited does lay down that proposition, but it is not applicable to this case. Touching this question, the court rests its decision upon the effect to be given to our statutes regulating the making of wills, and that the application of the rule as to personalty to devisees of real property might work great mischief, and tend to endanger the safety of titles which depend for their security upon the conduit of a testamentary devise. The writing executed in that instance was not such an instrument as declared the alteration to be either a revocation or wholly inconsistent with the nature of the previous devise. In this case the

terms of the written receipt given by the children to the testatrix show fully and clearly the purpose of the testatrix to be an alteration of her bequest to the extent of \$5,000 to each, and that, unless each child received in full the \$5,000, the equality of disposition expressed to be her purpose in her will would fail, and, unless these two sons be paid their respective balances of \$5,000, it would bring about a disposition entirely inconsistent with her previous bequest, and clearly declared and expressed intention of equality of disposition of her property. But in this case there is no devise of realty to the children. By her will the testatrix declares: "All the rest, residue and remainder of my estate, whether real or personal, * * * I give, devise and bequeath to my said executor, in trust to sell the same * * * within one year after my death, and the proceeds of such sales, after deducting all necessary and proper expenses of such sales, to divide equally among my five children;" naming them.

Here was no devise of real estate to the children. It was to the executor, in trust to sell the same and distribute the proceeds. By equitable conversion the proceeds became personalty, and it was these proceeds that the testatrix gave to her children. But in either view it seems clear that this question of a devise of realty is not necessarily involved in the adjustment of the matters in controversy on this accounting, for it appears from the accounts that the executor has received of personal assets, concededly such, nearly \$24,000, so that applying the rule of ademption and satisfaction to only a bequest of personalty, strictly such, the payments to Francis and George were properly made. I am therefore of the opinion that these payments to the two sons, Francis and George, were lawfully made to them by the executor on account of their distributive shares for the reasons and upon the grounds above stated.

Having reached that conclusion, it becomes unnecessary for me here to review in detail the facts and circumstances having relation to the other ground—that of estoppel. I have, however, carefully considered the evidence bearing upon that ques-

tion, and without here reviewing and analyzing the same in detail, to fully point out the parts thereof which sustain my conclusion, I am of the opinion that an estoppel is established against Mrs. Williams. There is a sharp contention as to whether or not the payments were only to be made upon condition that the Greenwood cemetery plot should be conveyed to her; but it seems to me that the evidence shows quite clearly that at the interview in which these matters came first under consideration, after the death of the testatrix, being at the family homestead at Nanuet, all the matters considered were separately disposed of and agreed upon, and that one was not made conditional upon the other. Mrs. Wingate, the daughter of Mrs. Williams, testifies that the three different matters—the payments to George and Francis, the trustee business, and the Greenwood cemetery lot—were spoken of in that order; and when asked if the Greenwood lot affair and the payments to her uncles were not mentioned at the same time, she answered, “One was mentioned previous to the other;” that the payments came first, and were agreed to, no one objecting, and they were all willing, then the trustee matter, and lastly the cemetery lot matter. Mrs. Williams herself testifies to no conditions. She says “they all consented to give the boys to make up the full amount what mother had intended for them.” In answer to the question, “When were those papers to be signed, or that money paid or to be paid?” she said, “There was no definite time for it.” Again: “At the Nanuet meeting, were there any papers agreed upon to be signed thereafter? Answer. No.” In answer to the inquiry whether papers were to be prepared, she says, “Yes, sir; there were papers to be brought.” Then: “Question. What was said in relation to the payments of the money and as to those papers, and the signing of them—when was the money to be paid over? Answer. Didn’t say when—what time—it should be paid. Q. But with reference to the signing of the papers, when was it to be paid? A. They didn’t specify any time. Q. What did you say in reply when they said they had concluded not to give you the Greenwood lot?

A. Didn't say anything." It seems to me that the only condition or understanding imposed was that no papers should become operative as to Mrs. Williams until submitted to her son for his approval, and not that these payments should not be made. Mrs. Wingate, when asked on her direct examination as to what was said at the Nanuet meeting in relation to paying over any money before the papers were signed, finally answered: "Isaac Newton Williams said that he wished that all papers, all writings, be submitted to him before they were signed by any of the persons." I am impressed by the evidence that Mrs. Williams gave her assent, without qualification, to the making of these payments in order to equalize Francis and George with the other children, and withheld objections to the same being made, knowing either that the same were being made, or were about being made, until the payments were actually made, and then first interposed her objections. It appears to me that after the Nanuet meeting the parties had their next meeting at Mr. Scott's office, about March 10th, and that the release had been prepared for signature on that occasion. It seems to me this must be so, as there appears at the foot of the paper an acknowledgment for Mrs. Williams with the word "March" in it, thus indicating that the writing had been prepared and submitted at some meeting in March. The payments in question to George and Francis were made by checks, which, as also the receipts, bear date March 10th. Mr. Kroehl testifies, and so do others, that the release was then read. He states that on the same occasion, in answer to the question, "Do you know anything about the payments of these amounts to Mr. George and Frank Turfler?" he answered: "Yes, sir; after the paper was signed, upon the statement, he turned over the checks"—meaning the executor. The same day this meeting was had, the checks were delivered while Mrs. Williams was still present. These payments were made on this same occasion at Mr. Scott's office. She made no objection. Mr. Scott's testimony is to the same effect, except that he makes the occasion April 15th when the payment to each child was made of \$2,500. In this latter I think he is in error,

as the exhibits show. George C. Turfler's testimony is in accord with that of Mr. Kroehl. An estoppel may arise although there was no designed fraud on the part of the party sought to be estopped, and where there was no intent to mislead, but where what was said was intended to influence the action of the party, and did influence him, and the duty rested upon the party giving the information or making the statement, if he spoke at all, to have ascertained the actual facts, so as not to have misled the other party to his prejudice. An estoppel may also arise from silence, as well as words, where there is a duty to speak, and knowing the circumstances requiring him to speak, keeps silent. *Thompson v. Simpson*, 128 N. Y. 270-288, 28 N. E. Rep. 627. "The authorities in this state are all harmonious on the subject of estoppel *in pais*. When a party either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person, or some person claiming under him." *Trustees v. Smith*, 118 N. Y. 634-641, 23 N. E. Rep. 1002. Let a decree be submitted for settlement and entry accordingly; costs to be allowed and adjusted on settlement of decree.

(Note on ademption of legacies:)

DEFINITION.—GENERAL OBSERVATION.—WHEN THERE IS ADEPTION.—WHEN THERE IS NOT ADEPTION.—RESIDUARY LEGACY.—ADEPTION PRO TANTO.

DEFINITION.

Ademption is defined as the act by which a testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death; also the act by which a specific legacy has become inoperative on account of the testator having parted with the subject. (*Anderson's Dictionary of Law*, p. 29; *Cozzens v. Jamison*, 12 Mo. Appeal, 456.)

GENERAL OBSERVATION.

Ademption is distinguished from satisfaction, in that in equity the latter word is defined as the donation of a thing, with the intention, express or implied, that it is to be an extinguishment of some existing right or claim. (Anderson's Law Dictionary, p. 920.)

"The distinction between ademption and satisfaction lies in this: In ademption the former benefit is given by a will, which is a revocable instrument, and which the testator can alter as he pleases, and consequently when he gives benefits by a deed subsequently to the will, he may, either by express words, or by implication of law, substitute a second gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word *ademption* because the bequest or devise contained in the will is thereby *adeemed*; that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant; and if he gives benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant or whether they will take under the will. Therefore, this distinction is manifest. In cases of satisfaction, the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise—in other words, the objects of the bequest—must be the same. In cases of ademption, they may be, and frequently are, different. The cases of *Durham v. Wharton*, 3 Cl. & F. 146, and of *Thynne v. Glengall*, 2 H. L. Cas. 131, afford striking and leading instances of each of these two cases." (*Chichester v. Coventry*, 2 H. L. Cas. 71.)

Ademption is confined to legacies of personalty. It is not predicable of devises (*Burnham v. Comfort*, 108 N. Y. 535), and it is not applicable to cases of intestacy.

WHEN THERE IS ADEPTION.

A testator bequeathed by a codicil to his will the income of a certain fund to his daughter for life, and the principal upon her death to her children. A prior codicil, which was made applicable to subsequent codicils, declared that as testator might make advancements to persons provided for in his will, such

advances, if charged in his books of account, should be so much on account of their legacies. The testator subsequently transferred the fund in question to a trustee for said daughter, and her children, and the daughter subsequently received the income. *Held*, that the legacy was adeemed. (Langdon v. Astor's Executors, 16 N. Y. 9.)

A testator specifically bequeathed a bond and mortgage which was afterwards foreclosed, and the purchaser, the mortgagor, executed a new bond for his debt, secured by a new mortgage upon the same premises. *Held*, that the legacy was adeemed, although testator left a memorandum in his handwriting that the purchaser's bond and mortgage was but a renewal of the bond and mortgage bequeathed, and that it was his intention that it should pass to the legatee. (Beck v. McGillis, 9 Barb. 35.)

A testator bequeathed to his executors a certain bond and mortgage (which was overdue at the date of his will and to which fact his attention was sharply called) in trust to pay the interest to his cousin for life, and upon his death to convert same into money and divide the proceeds amongst his said cousin's children. The mortgage was soon afterwards paid up, and testator deposited the proceeds with a firm with whom they were thereafter continuously kept. *Held*, that the legacy was a specific legacy, and was therefore adeemed. (Abernathy v. Catlin, 2 Dem. 341—citing Ashburner v. McGuire, 2 Bro. C. C. 108; Pitt v. Cannelford, 3 Bro. C. C. 160; Stanley v. Potter, 2 Cox, 180; Badrick v. Stevens, 3 Bro. C. C. 431; Innes v. Johnson, 4 Ves. 568; Fryer v. Morris, 9 Ves. 360; Barker v. Rayner, 5 Madd. 208; 2 Russ. 122; Gardner v. Hatton, 6 Sim. 93.)

Testator directed that on the death of his wife, to whom he gave a life interest in an undivided moiety of real estate, the same should be sold and the proceeds divided equally between his three daughters. Subsequently A., one of the daughters, accepted a conveyance from the testator and his co-owner of a portion of such real estate, and in consideration thereof executed a release of all her interest as heir-at-law of testator in said undivided moiety of real estate. *Held*, that as the real estate mentioned was directed to be converted into money at a future day, and the avails divided among the daughters, the rules applicable to personal bequests were to control, and that by executing the deed and release A. discharged the interest given to her by the will—distinguishing Burnham v. Comfort, 37 Hun,

216. The court said that the latter case does not hold that a devise cannot be satisfied by a subsequent conveyance of land, but that a devise cannot be satisfied by a subsequent payment of money. (Snell v. Tuttle, 44 Hun, 324.)

A testator gave to each of four persons one share out of the four owned by him in the Passaic Water Enterprise held in trust for him, and he directed a trustee named by him to transfer to said persons said shares, or the proceeds thereof, when realized, in the same manner as the said shares would have been to testator. After the execution of his will he sold out the so-called "shares" (which consisted of an undivided interest which decedent had in a joint business undertaking), and invested the greater part of the proceeds in the purchase of fifty bonds of a corporation known as the Passaic Water Company, thirty-eight of which bonds he had at his death. *Held*, that the legacies being specific, the effect of the sale was to cause an ademption thereof, and that the direction to the trustee did not show an intention to make the proceeds of the sale stand for the shares so that the bonds representing such proceeds should be deemed to be within the subject-matter of the bequests.

Testator added a writing below the attestation clause of his will, reciting the sale of the shares and purporting to give to each of the legatees general legacies in lieu thereof. *Held*, that as the paper was not executed as a will, the beneficiaries took no interest thereunder, and that although it manifested an intention on testator's part that the legatees of the shares should receive the proceeds of their sale, such intent was formed after the sale, and not at the time of the execution of the will. (Hosea v. Skinner, 32 Misc. Rep. 11—reversing Matter of Andrews, 25 Misc. Rep. 72.)

WHEN THERE IS NOT ADEPTION.

A testatrix bequeathed to her mother the sum of \$1,200 and interest on the same, contained in a certain bond and mortgage, for her life, and upon her death to testatrix's husband. *Held*, that the legacy was general and not specific, and did not adeem by extinction of the mortgage in testatrix's life. (Giddings v. Seward, 16 N. Y. 365.)

A testator by his will gave his daughter a legacy of \$400, and subsequently handed her that sum as a present, and on the same day executed a codicil by which he gave the legacy of \$400 on his daughter's death without issue to certain persons. *Held*, that the legacy was not adeemed, as the testator recognized the

legacy as a thing still in his mind, and remaining of force in his will. (DeGroff v. Terpenning, 14 Hun, 301.)

When testator gave advances to his children of unequal amounts, and then made a will dividing his property equally among his children, but making no reference to the prior advancements, *held*, that the advancements should not come into account in the division. (Camp v. Camp, 18 Hun, 217—reversing 2 Redf. 141.)

By different clauses of a testator's will, gifts of stocks of two railroads owned by him were made to his children and other persons in various amounts. The railroads were subsequently consolidated, and the newly issued stock was sold by a committee of the testator, who had become insane. *Held*, that there was no ademption, as the new stock in substance took the place of the old, and the sale by the committee was in no sense a transaction of the testator. (Shethar v. Sherman, 65 How. Pr. 9—citing Simmons v. Vallance, 4 Bro. C. C. 345; Purse v. Snaplin, 1 Atk. 414; Sibley v. Perryn, 7 Ves. 523; Tifft v. Porter, 8 N. Y. 516; Langdon v. Astor, 1 Duer, 478-546, 16 N. Y. 33; Giddings v. Seward, 16 N. Y. 365; Sleech v. Thorington, 2 Ves. Sr. 560; Robinson v. Addison, 2 B. 515; Ashburner v. Maguire, 2 Bro. C. C. 108; Mytton v. Mytton, L. R. 19 Eq. 30; Bothamby v. Shearsan, L. R. 20 Eq. 304; Norris v. Executors Thompson, 2 McCarter, 493, 16 N. J. Eq. 250; Chaworth v. Beech, 4 Ves. 566.)

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. The reason for refusing to extend the rule to devisees of real estate is that to so extend it would repeal the statute which applies to the revocation of wills. A testator devised to his daughter certain real estate, and thereafter paid her a sum of money, which he intended to be in lieu of the devise, and it was so accepted by her at the time, and such acceptance was expressed in a receipt she gave for the money. The testator did not subsequently alter his will. *Held*, that as the signing of the receipt and the payment of the money did not constitute a revocation of the will within the meaning of the Revised Statutes (3 R. S., Banks, 7th Ed., 2286, 2288), the daughter was entitled to the real estate devised to her. (Burnham v. Comfort, 108 N. Y. 535, affirming 37 Hun, 216—citing Davys v. Boucher, 3 Y. & C. Eq. Rep. 397; Langdon v. Astor's Executors, 16 N. Y. 34; Clark v. Jetton, 5 Sneed, 229; Allen v. Allen, 13 So. Car. 512; Weston v. Johnson, 48 Ind. 1.)

Testator in his will prefaced a list of legacies, among which was one of \$500 to plaintiff, by a statement that he had "at present" certain mentioned securities amounting to a certain sum; the legacies were then bequeathed, and all the residue of his personal estate given to his wife. He then mentioned that a certain further sum was due to him, and "when this is collected" he directed the payment thereof of certain legacies, including one of \$100 to plaintiff, and the remainder of his personal estate he gave to his wife. The debt due testator was paid to him during his life, and it was proved that the executrix had received, and there was in her hands, enough to pay both legacies to plaintiff, and that she had appropriated the estate individually. *Held*, that both legacies were general, and not subject to ademption by the extinguishment of the securities specified. (*Glover v. Glover*, 47 St. Rep. 765, 20 N. Y. Supp. 41.)

Although a will did not contain a residuary clause, testatrix clearly intended her daughter to be her residuary devisee and legatee by giving all her estate except a business carried on by testatrix and license thereto attached, which she bequeathed to her son, and she directed her daughter to pay out of a sum of \$1,800 belonging to testatrix deposited in a bank in the daughter's name, the sum of \$1,500 to her said son and \$50 each to her grandchildren. The \$1,800 would have paid these legacies at the date of the will, but at the testatrix's death nearly all the entire deposit had been withdrawn. The daughter accepted the devise and bequest. The son brought an action to establish a charge of the legacy of \$1,500 on the property devised to defendant. *Held*, that the legacy was demonstrative, and not specific, and that as the daughter accepted the devise, the latter became charged with payment of the \$1,500. (*Crawford v. McCarthy*, 21 App. Div. 484, 47 N. Y. Supp. [81 St. Rep.] 436.)

RESIDUARY LEGACY.

It was formerly held that the principle of ademption did not apply to a residuary legacy (*Hays v. Hibbard*, 3 Redf. Sur. 28), but the case in the text, and the authorities there cited, enunciate the contrary doctrine.

ADEPTION PRO TANTO.

Where the purpose of a gift is the benefit solely of the donee

himself, he can claim the gift without applying it to the purpose, whether the purpose be in terms obligatory or not, and therefore a bequest to a church to pay off a mortgage will go to the church, though part of the mortgage was paid in testator's lifetime, but the legacy is adeemed, however, to the extent of the testatrix's subscriptions toward paying off the mortgage. (Matter of Gasten, 16 Misc. 125, 74 St. Rep. 538, 38 N. Y. Supp. 948.)

A legacy to a daughter is not adeemed by money gifts made by testator to such daughter prior to the execution of his will, especially when declarations of the testator are proved, showing that the moneys given were intended to be out and out gifts, and were not to be deducted from the portion given her by will. Nor is it adeemed *pro tanto* as to a small amount of such money gifts made subsequently to the will, as such gift was but carrying out testator's purpose entertained long prior thereto. (Matter of Townsend, 5 Dem. 147; affirmed by General Term, 14 St. Rep. 587; by Court of Appeals, 113 N. Y. 560, 23 St. Rep. 722.)

In re ODELL'S ESTATE.

(Surrogate's Court, Westchester County, Filed December, 1892.)

1. WILL—PROBATE—PERSONS NOT CITED.

A petition by an heir and next of kin not cited on the probate, praying that the probate be revoked, will be denied, as the decree is binding on those cited, but the decree will be opened to allow petitioner to file allegations against the validity of the will.

2. SAME—REOPENING DECREE—DISCRETION.

When the estate consists of realty and personalty, the court has no ground for the exercise of discretion in reopening the decree as to the personalty, as the next of kin is absolutely entitled to an order opening the decree.

3. CODE CIV. PRO., SEC. 2481, SUBD. 6—SUFFICIENT CAUSE.

The expression "sufficient cause" in subd. 6, section 2481, Code Civ. Pro., relates only to the granting of a new trial, or a new hearing for fraud, etc., and not to the opening of a decree.

4. SAME.

Even if otherwise, it is "sufficient cause" for reopening a decree when petitioner was not cited on the probate of the will.

Petition by John W. Purdy, an heir-at-law and next of kin, to revoke probate of will.

Robert C. Taylor, for petitioner; Mitchell Levy, for executors.

COFFIN, S. The prayer of the petition for the relief sought is too broad. On the facts stated it seems the court should have been asked merely to open the decree admitting the will to probate, so that the petitioner may have an opportunity of being heard in opposition. The decree is conclusive against all who were cited, and, should it be opened for the purpose of making the petitioner a party, so that he may file objections, it will be unnecessary to cite those who have already been cited. The court had complete jurisdiction of the subject and of those persons, but not of the petitioner. No explanation is given as to why he was not cited. Perhaps he was supposed to be dead, or the executors were uninformed as to his relationship to the deceased. However that may be, the fact that he is an heir at law and next of kin is not disputed. Of course, had the deceased died intestate, the petitioner would have been entitled to his share of her estate, and he cannot be deprived of his right by an adjudication in a proceeding to which he was not a party. Had he been cited, he would have had a right to show, if he could, that the will was invalid on any proper ground. He has not had such opportunity, and it should be accorded to him. It is always the practice before probate, where it is discovered that a necessary party has not been cited, to suspend the proceeding until he is brought in; and no good reason is discovered why such a person, who was ignorant of the proceeding, should not be made a party, and stand on precisely the same ground as to his rights as he would have done if made a party originally.

It is claimed on behalf of the executors that it is discretionary

with the court to open the decree or not, and a strong reason why it should not be done in this case is that the bulk of the estate has already been distributed in good faith by the executors. It can be regarded as discretionary only so far as the claim is confined to realty, as in the case of *Bailey v. Stewart*, 2 Redf. Sur. 212; *Bailey v. Hilton*, 14 Hun, 3, where it was held that the discretion was properly exercised, as the petitioner had an ample remedy at law to recover his interest in the realty. What, if any, remedy there would be in this case to recover the share of the personalty already distributed in good faith, it is not necessary to inquire. But it is claimed on behalf of the petitioner that, inasmuch as the will directs a sale of the realty, the proceeds became personalty. This would be true if the will is to stand, and is not true if it should, for any reason, be overthrown by any effort of the petitioner, and his prayer is that it be declared not to be the last will and testament of the deceased. So far as this motion is concerned, the portion of the realty ordered by the will to be sold must, therefore, be regarded as real estate, but, as the estate consisted of both real and personal, it would seem that there is no ground for the exercise of discretion as to the personalty, and that, as far as the latter is concerned, the petitioner is absolutely entitled to an order opening the decree. He cannot be deprived of property rights given him by statute, without being afforded an opportunity to be heard.

On behalf of the executors it is contended that no "sufficient cause" is shown, as is required by subdivision 6 of section 2481 of the Code. That expression, however, seems to relate only to the granting of a new trial, or a new hearing for fraud, etc., and not at all to opening, etc., of a decree. But while this may be so, abundant cause is shown in the fact that a person who was entitled to be cited was not made a party, and had no knowledge or notice of a proceeding which was calculated to deprive him of his possible rights as heir-at-law and next of kin. This is regarded as quite "sufficient cause." As some of the estate consisted of realty, yet a considerable portion, to wit, about \$65,-

000, was personal property, as to which the petitioner has a clear right to an order opening the decree; it does not seem practicable or proper to open the door half way, and hear him so far as the latter is concerned, and deny him a hearing as to the former, in the exercise of a permissible discretion. The decree will therefore be opened so far as the petitioner is concerned, and as he is now before the court he must forthwith file his allegations against the validity of the will and codicil, if he have any, and then the executors must reprove the same by the subscribing witnesses, and such proceedings be had as are usual in the ordinary cases of probate. While it will be the duty of the executors to endeavor to sustain the validity of the will and codicil, any person having an interest in supporting them will be allowed to aid them in that effort. The prayer of the petition that the will be decreed not to be the last will of the deceased, and that the probate thereof be revoked and annulled, is denied; but the decree will be opened for the purpose above indicated, and an order entered accordingly.

In re LYONS' ESTATE.

(Surrogate's Court, Westchester County, Filed December, 1892.)

1. GIFT OF PERSONALTY—CONSTRUCTIVE DELIVERY.

On application by a legatee to compel payment of a legacy of \$200, the executor objected that petitioner had not paid three notes of \$100 each, which testatrix had indorsed for petitioner and paid. Petitioner alleged that testatrix had given her the notes. It appeared that testatrix paid and took up the notes, and then, while boarding with petitioner, made her will, bequeathing petitioner the legacy of \$200, telling petitioner that she had cancelled the notes, and on its being suggested that petitioner witness her will, decedent stated that petitioner could not be a witness, as she might lose her legacy. It was also in evidence that testatrix requested a lady friend to deliver decedent's papers to latter's uncle after her death, and that among the papers so delivered were the notes in question, which were uncanceled. *Held*, that there was no actual or constructive delivery of the notes so as to make a perfect gift of them to petitioner.

2. LEGACY—PAYMENT—PROCEEDINGS—JURISDICTION.

In a proceeding by a legatee to compel payment of a legacy, there must be a petition, citation and answer under Code Civ. Pro., sections 2717 and 2718, and proof under subd. 2, section 2718 that there is sufficient personal property to pay the legacy, otherwise the surrogate does not acquire jurisdiction.

Application by Elizabeth Blakeman, to compel payment of a legacy.

L. T. Yale, for petitioner; Wm. F. Purdy, for the executors.

COFFIN, S.—Gifts of chattels personal are the act of transferring the right and the possession of them, whereby one person renounces, and another immediately acquires, all title and interest therein. A true and proper gift is always accompanied by delivery of possession, and takes effect immediately. It may be regarded as axiomatic that, without delivery of the subject of it, there is no gift. Where delivery accompanies the words of gift, the gift is perfect, and no question can arise in regard thereto, but there may be a constructive delivery, determinable by the facts established. Most of the controversies on the subject of gifts have arisen in regard to this last species of delivery, the facts relating thereto being as various as the cases are in number; but in all of them the underlying question was, had there been a delivery? Of course, a so-called gift, without a delivery, actual or constructive, may be revoked. Now, in this case, no actual delivery of the subject of the gift is pretended, and all, therefore, that remains, is to determine whether the facts stated constitute a constructive delivery.

The facts relied upon by the petitioner are briefly these: That deceased boarded with the petitioner, after she had paid and taken up the notes as indorser, and paid her board without any pretense or suggestion that the petitioner was indebted to her; that the testatrix, while so boarding, executed her will, in and by which she bequeathed to the petitioner the sum of \$200; that the testatrix told petitioner that she had cancelled said notes, and that she owed her nothing; that on the execution of

the will it was suggested to the deceased that the petitioner should be one of the witnesses thereto, whereupon the deceased stated that the petitioner was a legatee therein to the extent of \$200, and could not properly be a witness, as she might thus lose the legacy, and she wanted her to have the whole of it; that she declared said notes had been paid. And it is further shown that the testatrix, shortly before her death, informed a lady friend about her papers, and requested her, after her death, to deliver them to her uncle, Theodore F. Bayles, who is one of the executors of her will, which she did, and that on examining said papers the three notes were found among them. On this state of facts, can we say there was a delivery of the notes, actual or constructive? Clearly not the former, and, it seems to me equally clear, not the latter. The petitioner does not state that she had ever paid the notes, nor does it appear that they had ever been cancelled; but by direction of the deceased they passed into the hands of the executor, and thus they became subsisting liabilities of the petitioner to the testatrix. If the latter really intended to give them, it was a simple matter to have delivered them to the former. If she had intended to cancel them, that was also a simple matter for her to have done. But she did neither, and left them as a part of the assets of her estate.

This matter has come before the court in an informal manner. No petition has been presented, or citation issued, as provided by sections 2717 and 2718 of the Code, nor answer filed under the provision of subdivision 1 of the latter section; nor has it been proved, under subdivision 2 of the latter section, that there is sufficient personal property of the estate to pay said claim as therein provided. The parties simply appeared in court, and the affidavit of the legatee, with other affidavits annexed, was presented, and the executors objected orally that the facts alleged therein did not prove a gift of the notes. Under these circumstances, it is more than doubtful whether the court has obtained any jurisdiction in the premises, but, out of deference to the learned counsel engaged, has proceeded to give some consideration to the merits of the case. I think the statute was in-

tended to deprive the surrogate of jurisdiction over such a question in a proceeding of this character. The application must be dismissed, but without prejudice to an action or accounting in behalf of the applicant.

In re WILLIAMS' ESTATE.

(1 Misc. 440.)

(Surrogate's Court, Greene County, Filed December, 1892.)

1. WILL—STATUTE AGAINST PERPETUITIES.

A testator left his personalty to the Trustees of the New York Annual Conference of the Methodist Episcopal Church, upon trust to apply the interest annually as salary of the pastor of St. Paul's Methodist Episcopal Church at Athens, Greene County, New York, provided that if the said St. Paul's Church should erect a parsonage for its pastor it might draw upon said Trustees for the amount necessary therefor, and provided further that if the last mentioned church should become extinct, the Trustees should turn over the trust funds to the Board of Church Extension of the Methodist Episcopal Church. *Held*, that as there was no limitation upon the suspension of the absolute ownership of testator's personal property, except at the termination of the corporate existence of St. Paul's Methodist Episcopal Church, and as there was no limitation of the time for the erection of the parsonage, the will was contrary to 1 Rev. St. p. 773, sec. 1, providing that the absolute ownership of personal property should not be suspended for a longer period than two lives in being at testator's death, even although (having reference to the first provision) the Methodist Church at Athens had, before testator died, purchased a parsonage which was not free from debt, as it was the nature, not the execution, of the power that determined its validity.

2. SAME—POWERS OF CORPORATIONS.

In such case the corporate powers of the Trustees of the New York Annual Conference of the Methodist Episcopal Church did not include the right to act as trustees of the property given them and pay over the income to the pastor of St. Paul's Church as one of the class of ministers mentioned in the statutes of incorporation (Laws 1843, ch. 131; Laws 1887, ch. 379), which provided that the trustees might take by devise or purchase, and that they should take charge of all property belonging to the New York Annual Conference, so far as the latter

might direct, and appropriate same for the benefit of the itinerant, supernumerary and superannuated preachers and widows and orphans of deceased preachers in such manner as the Conference might direct, as the capacity to take a devise meant a legal devise, not a devise void under the statute, and there was no provision for the trustees to hold funds for the building of parsonages.

Application to revoke probate of will and letters of administration c. t. a.

W. Irving Jennings, for proponent; J. A. & A. C. Griswold, for contestants.

SANDERSON, S.—John C. Williams died at Athens on the 29th day of July, 1891, in the eighty-second year of his age. His will bears date October 30, 1884. The disposing part of it reads as follows:

“I give and bequeath all of my personal estate, goods and chattels, of what nature or kind soever, to the Trustees of the New York Annual Conference of the Methodist Episcopal Church, to be held in trust by them, and the interest thereof applied each year on salary of the pastor of the St. Paul's Methodist Episcopal Church, situated at Athens, Greene County, New York.

“The above will and testament is subject to the following conditions: (1) If the trustees of the St. Paul's Methodist Episcopal Church, situated at Athens, Greene County, New York, erect a parsonage for the sole use and benefit of pastor of said church, they are authorized to draw upon the Trustees of the New York Annual Conference of the Methodist Episcopal Church for the amount necessary to secure the erection of said parsonage, free of debt. (2) If ever the society now known under the corporate name of St. Paul's Methodist Episcopal Church, situated at Athens, Greene County, New York, should become extinct, the Trustees of the New York Annual Conference of the Methodist Episcopal Church are authorized to turn over to the Board of Church Extension of the Methodist Episcopal Church the amount held in trust by them, under the powers vested in them by this will and testament.”

No executors are named in the will. The theory of the will is to leave the personal property of the testator in trust during the corporate existence of St. Paul's Methodist Episcopal Church at Athens, with the exception of a part of it that may be applied to the erection of a parsonage. The Trustees of the New York Annual Conference are the trustees under the will, and the pastor of St. Paul's Methodist Episcopal Church at Athens is the principal beneficiary. The legal title to the personal property of the testator is in the trustees, without any power of disposal of the same. They must keep it invested in order to produce an income, and they are authorized to turn over to the Board of Church Extension of the Methodist Episcopal Church the amount held in trust by them in case the Methodist Church at Athens becomes extinct. It would be a clear violation of the duty of the trustees to dispose of the principal fund. The absolute ownership of the property is therefore suspended during a long period of time, unlimited by lives in being. *Adams v. Perry*, 43 N. Y. 487, 499. The Revised Statutes provide as follows:

"The absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance, and until the termination, of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a will, for not more than two lives in being at the death of the testator." 1 Rev. St. 773, section 1.

There is no limitation whatever in the will in question upon the suspension of the absolute ownership of the property of the testator, except at the termination of the corporate existence of St. Paul's Methodist Episcopal Church at Athens. The will is therefore contrary to the statute, and is clearly void, unless it can be saved by other provisions of law. An examination of the decisions of the Court of Appeals, in cases similar to the one in question, will show what application they make of this statute. In *Adams v. Perry*, 43 N. Y. 487, the twentieth clause of the will provides that, if the donees under the will

(in this case an incorporated academy) fail to carry out the provisions of the will, the donation is void. It was held that this clause of the will is void because it violates the law against perpetuities. The fourth clause of the will required the executors to invest the residue of the real and personal property, and pay over the income annually to the Lowville Academy. It was held that this clause was also void, as contrary to the statute above cited. In *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. Rep. 839, where the will provided that the mayor of New York and others should be trustees of the property of the testator for the purpose of erecting and maintaining a library, it was held that this provision was void, for the reason that it suspended the power of alienation or of the absolute ownership of personal property for more than two lives in being. In *Read v. Williams*, 125 N. Y. 560, 567, 26 N. E. Rep. 730, the executors were directed to set apart a trust fund to be perpetually kept, and apply the income for cemetery purposes. This clause was held void. In *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. Rep. 801, where the will made a bequest to the executors for the permanent endowment of a school, the legacy was held void. In the same will a bequest to the town of Hempstead for the support of the poor of the town was held void, on the ground that the beneficiaries were not sufficiently defined, and on the further ground that such a trust was not within the corporate or administrative work of the town. The condition made in the will of the testator that, if the trustees of the Methodist Church at Athens should erect a parsonage, they are authorized to draw upon the trustees named in the will for an amount sufficient to erect the parsonage free from debt, is void for the same reason, viz., that there is no limitation as to time for the erection of the parsonage, so as to bring it within the purview of the statute. It is obvious that the trustees under the will must hold the trust fund until the trustees of the church should see fit to build a parsonage. This might be a longer or shorter time than that of the continuance of two lives in being. The statute

leaves the time in the discretion of no one. The lives, during the continuance of which the absolute ownership of personal property may be suspended, must be named in the instrument making the gift. Proponents seek to overcome this difficulty by showing that the Methodist Church at Athens has already purchased a parsonage, and had done so before testator died, and that the same is not free of debt. Assuming that the clause of the will now under consideration admits of the construction that would cover the purchase, as well as the erection, of a parsonage, the difficulty is inherent in the will itself. It is not the execution, but the nature, of the power that determines whether it is valid or not. *Tilden v. Green*, 130 N. Y. 29, 52, 28 N. E. Rep. 880. Both of the above provisions of the will would have been saved if the estate of the testator had been left to the Methodist Church at Athens for the purposes above mentioned. The support of its pastor and the erection of a parsonage are within the powers and duties of a religious corporation. The legacy would not have then been regarded as a "trust," within the meaning of the statute, and there would have been no suspension of absolute ownership. *Wetmore v. Parker*, 52 N. Y. 450; *Williams v. Society*, 64 Hun, 163, 18 N. Y. Supp. 820. But this is not the theory of the will. As it is now, the Methodist Church at Athens has no control over the fund during the continuance of the trust.

The last clause in the will, which authorizes the Trustees of the New York Annual Conference to pay over the trust fund to the Board of Church Extension of the Methodist Episcopal Church, if ever the aforesaid Methodist Church at Athens becomes extinct, is hopelessly bad, and no attempt is made on the argument to defend it. It is claimed by the counsel for the proponents that while the absolute ownership of the trust fund mentioned in the will is not limited upon lives in being, as required by the statute, the corporate powers of the Trustees of the New York Annual Conference of the Methodist Episcopal Church include the right to act as trustees of legacies given them, and pay over the income to the itinerant, supernumerary,

and superannuated ministers of the Methodist Episcopal Church connected with the New York Annual Conference, and that the pastor of St. Paul's Methodist Church at Athens belongs to this class of ministers. The trustees aforesaid are themselves an incorporated body. The act of incorporation provides that the said trustees are capable of taking by devise or purchase. The act further provides that "the said trustees shall take charge of all funds, personal and real estate whatsoever, now belonging, or which shall hereafter belong, to the said New York Annual Conference, so far as the said conference shall direct, and no further; and the said trustees shall appropriate the said property, and the avails of it, for the benefit of the itinerant, supernumerary, and superannuated preachers, and the widows and orphans of deceased preachers, in such manner as the said conference has directed, and shall from time to time direct, and no other." Laws 1843, ch. 131; Laws 1887, ch. 379. These are the only provisions that are claimed to support the contention of the proponents in this case. It is manifest that they fall far short of giving the corporate power for the performance of the trusts in this will. There is no provision for the said trustees to hold funds for the building of parsonages. The capacity to take by devise means a legal devise. It does not include a devise void under the statute. If there were no provision for them to take by devise, they could not take at all under a will. Corporations can do nothing except what they are authorized to do by law. All the property that the trustees are allowed to take under the above-quoted section of their charter is what belongs to conference, and only so much of that as the latter body may direct. The disposition of it is also completely under the control of conference, which is the governing body. The legacy in the will of the testator is not the property of conference, nor is the trust for the use of it in any way under its management. The trustees, as incorporated, and the New York Annual Conference, are separate bodies. As was said in *Fosdick v. Town of Hempstead*, *supra*, adapting the language there used to the facts of this case, a trust such as is mentioned

in this will is not within the corporate or administrative work of the said trustees. It is a case of *ultra vires*. They have no power to act. It follows that, if the bequest was otherwise good, the said trustees could not perform the duties of the trust in this will, and their trusteeship would fail.

The will of John C. Williams was admitted to probate September 7, 1891. A petition had been filed by the treasurer of the Trustees of the New York Annual Conference, stating, among other things, that said Williams had died, leaving no next of kin him surviving. A citation was issued to the public administrator, and on its return, no one appearing to oppose the probate of the will, proof was made by the subscribing witnesses of its due execution. On the 18th of April, 1892, Alida C. Yager made application to this court for a decree revoking the probate of said will, and the letters of administration with the will annexed which had been issued thereon, stating, among other things, that said petitioner and Snyder Pelham were second cousins of said Williams, and had received no notice of the proceedings for the proof of his will. Subsequently an order was made opening the decree for the probate of said will, and said petitioner and Snyder Pelham by a supplemental citation made parties; whereupon said Yager and Pelham filed objections to the validity and due execution of said will. The invalidity of the last will and testament of said John C. Williams, deceased, having now been established, a decree must be entered revoking the former probate of said will, and the letters of administration with the will annexed issued to St. Paul's Methodist Episcopal Church of Athens and Ewing A. Chase, and refusing to admit said will to probate.

In re TURFLER'S ESTATE.

(Surrogate's Court, Rockland County, Filed May 16, 1892.)

1. WILL—CONSTRUCTION.

A testator gave to his wife the income of all his property, both real and personal, "as long as she lives, for her benefit and support," but out of the income she was to pay all necessary repairs upon the buildings, and all taxes, etc. The only authority the executors were to exercise during the wife's life was to pay debts and funeral expenses. After her death they were directed to sell the property, and pay the legacies enumerated in the will. Testator also directed that his two sons should not come into possession of their property until after his wife's death, unless she consented thereto in writing. *Held*, that the widow took a life estate under the will, and no title to testator's property or control thereof during the wife's life was given to the executors except to pay his debts and funeral expenses.

2. EXECUTORS' ACCOUNTING—COMMISSIONS.

In such case the executors were not entitled to include in their account the income of the estate collected by them during the widow's life under an arrangement with her, nor the disbursements thereout for taxes during her life, nor commissions on such collection.

4. SAME.

The compensation for such collection was a matter to be adjusted between the executor, as an individual, and the personal representative of the widow.

4. SAME.

The persons interested in the estate agreed in writing with the executors that the real estate should not be sold; that for the purpose of fixing the executors' compensation the same should be treated as of a certain value; and that the executors would accept a certain agreed compensation. *Held*, that although the real estate was not sold, the beneficiaries and executor were mutually estopped, under this agreement—the former from depriving the executor of his commissions thereunder, and the latter from claiming more than the agreed compensation, which was less than the statutory allowance.

5. SAME.

An executor's commissions should not be included in his account. Commissions are allowed only by order of the Court, and on settlement of the account.

6. COMPENSATION TO BOOKKEEPER—ADJUSTMENT.

Under the circumstances of this estate, a credit of \$950 for the services of a bookkeeper was proper, but the same should be adjusted between the income estate of the widow and the estate held by the executors.

7. SAME.

An item of \$100 for the services of a bookkeeper in preparing the executors' account should be excluded from the account and be disposed of upon the taxation of the costs of accounting.

Settlement of the accounts of Jacob C. Turfler and George F. Turfler, executors of the will of George C. Turfler, deceased.

Scott & Upson, for executors; T. C. Cronin and I. Newton Williams, for contestants.

WEIANT, S.—The testator, George C. Turfler, died, leaving a last will and testament which was admitted to probate in this court, and letters testamentary granted thereon to Jacob C. Turfler and George F. Turfler, the accounting parties herein, on or about May 17, 1875. This last will and testament contained the following provisions:

“First. My will is that my executors hereinafter named shall pay all my just and lawful debts, including funeral expenses and physicians' bills, as soon after my death as is practicable. Second. I give unto my beloved wife, Elizabeth, the income of all my property, both real and personal, as long as she lives, for her benefit and support; but out of the above income my wife, Elizabeth, must pay all necessary repairs upon the buildings, and all taxes, such as Croton, government, State, county and city, besides insurance, etc.; and after the death of my said wife, Elizabeth, my will is that all the property of which I die possessed or seized (except as hereinafter stated) shall be divided amongst my children and legatees as follows, viz.: * * * Third. My will further is that my executors hereinafter named shall pay unto the following named persons the legacies I herein bequeath within one year after the death of my beloved wife, Elizabeth,

unto," etc. Here follow the names of several legatees to whom specific sums are bequeathed, and then the testator further disposes of his estate in these words: "My will further is that my executors hereinafter named shall sell all my property, both real and personal (except such property as I hereinafter bequeath unto my two sons Francis A. Turfler and Jacob C. Turfler), and upon the sale of any of my real estate I do hereby authorize my executors to give good and sufficient deed or deeds to the purchaser or purchasers thereof for the conveyance thereof. * * * The sale of the above property shall not take place until after the death of my wife, Elizabeth, and within two years thereafter." Then follow certain devises and provisions in relation to the testator's three sons, and the testator then adds: "My will is, and I wish to be understood, that my sons Francis A. Turfler and Jacob C. Turfler shall not come into possession of their property until after the death of my wife, Elizabeth, unless she consents thereto in writing." "Eighth. After paying the legacies above described, my will further is that my executors pay all my just debts, and after that to dispose of the balance as follows." Provisions making absolute disposition of such balance of the testator's estate, and appointing the accounting parties herein executors of his will, then follow.

These executors caused an inventory of the personal estate of the testator to be made and filed August 2, 1875, showing an aggregate of personal assets of \$42,006.16. From the accounts filed herein, and the summary statement thereof, it appears that the executors have charged themselves as having received the aggregate sum or amount of \$166,569.20, and credited themselves as having paid out the sum of \$161,181.83, leaving a balance in their hands of \$2,115.40. Of the moneys or properties so charged to themselves as receipts, between \$110,000 and \$112,000 appear to have been rentals of the real estate devised by the testator, and some \$5,000 to \$8,000 as income from other properties and sources. Of the sum of \$161,181.83 the amount of \$1,962.20 appears to have been paid for burial expenses and

a monument for the testator's grave, the sum of \$407.79 for his debts, while about \$72,000 was paid to the widow as income, about \$9,000 for repairs of buildings, about \$25,500 for taxes, about \$1,300 for insurance, for commissions to agents for caring for and renting of houses about \$900, and for services of a bookkeeper \$950. The contestant objects to the allowance of the \$950 for compensation to the bookkeeper, and the further sum of \$100 for the same purpose; to the item of \$1,250 for services of attorney and counsel not heretofore paid; and to the items aggregating \$1,455, retained as commissions by the executors; and insists that the accounts of the executors, so far as the same relate to or include the receipt and disbursement of moneys received by them for the rents of the real estate and for the payments made in respect thereto, that the same should form no part of their account as executors; that no commissions are therefore legally allowable thereon; and that no part of the expenses of managing the estate during the widow's lifetime is allowable on this accounting.

Thus the main question submitted for determination is whether or not the will devolved upon these executors the administration of the testator's estate during the lifetime of the testator's widow. After careful consideration, I have reached the conclusion that it was the intention of the testator to give his widow a life interest or estate in his property, and to vest her with the possession and control thereof, and during her lifetime to give no title thereto or control thereof to his executors, except for the payment of his debts and burial expenses. The intention of the testator is controlling where he contravenes no rule of law, and to give effect to such intention is the primary rule of construction applied by courts in construing wills. Redf. Law & Pr. Sur. Cts. 251. The testator, as we have seen, gives to his widow "the income" of all his property, "both real and personal, as long as she lives, for her benefit and support." As he gives to no one else any authority or control over his estate, not even his executors, by any provision of the will, I think the necessary implication arises that his widow, who was to receive

the benefits accruing therefrom for her lifetime, must have been regarded by him as the one who should have the custody and control of such property, in order that such income could be realized and received. But there are other provisions of the will that indicate that the widow, and not the executors, was to be the manager and possessor of the testator's property during her lifetime. He adds to the bequest and devise of "the income" to her these words: "But out of the income my wife, Elizabeth, must pay all necessary repairs upon the buildings, and all taxes, besides insurance." The obligation to make these payments put upon her necessarily implies that upon her is devolved the duty of also caring for and managing the properties. And clearly these specific provisions as to his widow's right to receive the income, and the duty to maintain the property in due condition, and save it from the ordinary burdens which a life tenant usually discharges, in the absence of any authority, power, or trust in words conferred upon the executors, indicate that the executors, as such, were in no wise to act in that behalf during the widow's lifetime. Even the power of sale conferred upon the executors is in specific language restricted and prohibited until after the death of the widow. It thus appears that the testator intended that even this limited power given his executors should not be exercised during his widow's lifetime, confirming the view that it was the testator's purpose to make her the virtual owner, controller, and possessor of his property during her lifetime, free from the interference of the executors, or any of those who were made objects of his bounty, and postponing all their rights and the enjoyment of their estates until after her death.

A further circumstance indicating that the testator intended that his widow alone should have the benefits of his estate, and manage and possess the same, is furnished from the explicit language of his will, wherein he says:

"My will is, and I wish to be understood, that my sons Francis A. Turfler and Jacob C. Turfler shall not come into possession

of their property until after the death of my wife, Elizabeth, unless she consents thereto in writing."

The word "income," as used by the testator, clearly means all benefit and profit whatsoever coming from the property, whether from use or otherwise; and the necessary implication follows that the widow was given the right to use or occupy the same, or otherwise obtain income or profit or benefit therefrom. A gift to a widow of the rents and income of real estate for life creates an estate in the realty itself, and, if no duties are charged upon the executors with respect to their collection or application, no estate or trust is created in them in respect thereto. *Macy v. Sawyer*, 66 How. Pr. 381. This is not a case like *Marx v. McGlynn*, 4 Redf. Sur. 455, cited by the counsel for the executors. There the testator's will read: "It is my will that my executor pay A. B. all the income derived from my estate after paying the necessary expenses accruing thereon." Nor is it similar to *Betts v. Betts*, 4 Abb. N. C. 317, where the testator directed that the income, rents, etc., be paid by his executors to a beneficiary. Nor to *Tobias v. Ketchum*, 32 N. Y. 319, where the executors were clothed with full power to rent, lease, repair and insure. In *Re Blauvelt*, 30 N. E. Rep. 194, the Court of Appeals recently decided that where a widow was given a life estate in the testator's property, and with a power of sale, the executrices, as such, were not entitled to receive the rents and income of the property; that they had no power over or right in the possession of the property in its original form or of the proceeds after the sale thereof, or to compel an accounting therefor; that the executrices, as such, had no interest in the matter, and that they were not accountable or responsible for the income or the principal estate during the widow's lifetime. To entitle an executor to receive and hold property under the will of his testator and receive compensation for managing or administering the same, it must appear affirmatively from the instrument and the rules of law applicable to the construction of the same that such right or power is conferred upon him. The only provision in this will that is to be given effect by the executors dur-

ing the lifetime of the widow is the one directing the payment of the funeral expenses and debts. Nothing appears that requires or empowers them to receive the rents and profits, or during such times imposes upon them any trust. "A devise of lands to executors, or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees, but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator subject to the execution of the power. 1 Rev. St. p. 729, sec. 56. Thus it appears that the lands of this testator passed to his widow for her lifetime, and the title immediately became vested and remained in her until her death, and no one but her was entitled to the possession of the same, or could lawfully receive the rents or profits therefrom. *Clift v. Moses*, 116 N. Y. 144-152, 22 N. E. Rep. 393. "There does not appear to be any question but that an heir-at-law or a devisee under a will, where there is no charge upon the real estate, or where the real estate is not converted into personalty, is entitled, as against the personal representatives or creditors of the deceased, to receive and retain as his own the rents and profits arising from the realty until the same is sold for the payment of debts." *Clift v. Moses*, *supra*, and cases there cited.

The counsel for the executors urge that the evidence shows that the parties interested in the estate acquiesced in the executors receiving the rents and income of the estate, and the payment therefrom of the necessary sums to discharge the current expenses imposed upon the properties, and the balance thereof to the widow; and that thereby a practical construction was given to the will as imposing a trust upon the executors appertaining to the administration of the estate. Evidence was adduced tending to sustain that view, but it is insufficient to establish that proposition; and, in any event, I am of the opinion that on this accounting the provisions of the will and the rules of law applicable to the construction of the same preclude the consideration of a practical construction that is not borne out

from, and in accord with, its provisions. I doubt very much whether beneficiaries under a will can by their conduct place a construction upon a will and give to the same a different meaning from what its terms import and the law supplies, so as to make the same obligatory upon a court called upon to judicially administer the estate. Upon taking the testimony having relation to this question the court reserved the consideration of the accuracy of its rulings, and now determines that the same should stand as the same appear. The purpose of this testimony was to establish an arrangement between the executors and the widow, under which they, as executors, were to collect and disburse the income of the estate given her by the testator's will, and thus constitute the same an estate transaction, by virtue of which they should entitle themselves, as executors, to incur the usual expenditures in behalf of the estate, and to claim and receive the usual statutory commissions of executors. Practically, the rulings on these questions make little or no difference to those interested in this estate, for, if it be admitted that this income was received and disbursed by them as executors, then it follows that the income fund to which the widow alone was entitled must bear all the expenses of the administration of the same, as also the commissions of the executors, and not the principal estate. But the personal transactions and communications between the executor and the widow, sought to be elicited in his examination in his own behalf, and claimed not to fall within the restrictive provisions of section 829 of the Code, were to be put in as evidence to establish a claim of the executor for such expenditures and commissions against this estate of the testator. The questions, therefore, called for incompetent testimony as hearsay, if offered for the purpose of binding the estate of the testator; and as incompetent, under section 829 of the Code, if it were offered to bind the estate, or those interested in the same, of the widow, Elizabeth Turfler. The executor was testifying in his own behalf as against the contestant, a person claiming and having an interest in both estates. *Pope v. Allen*, 90 N. Y. 298. The construction that has thus been given to the

will of the testator, and which must be adopted and applied in the adjustment and settlement of the accounts of the executors herein, precludes from consideration as a part thereof all income from the estate property as a part of the estate with which the executors are chargeable, and which they were required to administer, and also all disbursements credited in the accounts as paid therefrom; and the decree herein to be entered should adjust the executors' accounts with all such receipts and payments excluded.

In the Matter of Brown, 5 Dem. Sur. 223, it was held that, where one who is executor of a will sells the testator's real property under a power conferred upon him by that instrument, personally, and not as executor, he should not include the proceeds of the sale in his official accounts; nor are the same chargeable with executorial commissions. The matter of the compensation for the services of the executors in the management of the properties during the lifetime of the widow, the collections of the income, and the payments therefrom, it seems to me, constitute an individual transaction between the executor or executors performing such service and the widow, and is a matter to be adjusted between such executor or executors, as individuals, and the personal representative of the estate of the widow. The power of attorney put in evidence as an exhibit shows that such management of the testator's property during the lifetime of the widow was a matter between her and the executor, Jacob C. Turfler, individually, and not as executor, and is a strong circumstance indicating that this income was not received and disbursed by him as executor. The true basis for the compensation of the commissions of the executors is therefore the aggregate receipts and payments, excluding all income and disbursements therefrom, and to be computed at the statutory rates. *Phoenix v. Livingston*, 101 N. Y. 451-456, 5 N. E. Rep. 70. Of course, in speaking of excluding income and disbursements thereof, I have reference only to the income and payments therefrom from the death of the testator to the death of the widow.

There is, however, another question submitted for considera-

tion touching the compensation or commissions of the executors. They claim that they are entitled to commissions on the realty as if the same had been actually sold, and the proceeds distributed in accordance with the provisions of the will. The will, as we have seen, provides that after the death of the widow the executors shall sell all the testator's property, "real and personal, except," etc., "and to convert all stock, bonds, and other personal property into money, the same to be divided by my executors as follows: the sale of the property not to take place until after the death of the widow, and within two years thereafter." This direction is specific and mandatory upon the executors, and, when considered and construed in connection with the other items of the will providing for the distribution of the testator's estate in accordance with his intention, upon the death of the widow, the same became personalty in contemplation of law (*Smith v. Buchanan*, 5 Dem. Sur. 169, and cases there cited); and the executors would be entitled to commissions thereon in the event of a sale by them and a distribution of the proceeds (*id.*); but it seems not if the lands remained unsold (*Phoenix v. Livingston*, 101 N. Y. 451, 5 N. E. Rep. 70.) The lands not having been sold would, therefore, be decisive of the matter, were it not for the fact that by a certain instrument entered into on March 15, 1886, it was agreed by and between the contestant and all parties interested in the estate, for reasons therein set forth, that the real estate should not be sold in pursuance of the provisions of the testator's will, and that George F. Turfler, Jacob C. Turfler, the two executors, herein, and Francis A. Turfler, should thereafter manage said properties as trustees, and therein specifying the powers and prescribing their duties as such. It was provided by said agreement that the executors of the said George C. Turfler "may at any time after the said 1st day of June, 1886, submit their final accounts in the Surrogate's Court as such executors, and it shall be deemed a full and sufficient accounting on their part of and for all the said property herein referred to, and all income, rents and profits thereof, as of any time subsequent to the 1st day of

June, 1886, if they submit upon such final accounting this instrument." It was further thereby "agreed that the executors shall be, and they hereby are, except for the purpose of such final accounting, released, discharged, and wholly exonerated from any further duty or obligation of any kind respecting the said property from and after the said 1st day of June, 1886." "And for the purpose of fixing the statutory compensation of the said executors respecting the said property, it is further agreed that the said property may be valued upon such final accounting at the round sum of one hundred thousand dollars, and may, for the purposes of fixing such compensation, be taken in such accounting as if it were such sum in cash." Under the same date, and as a part of the above arrangement, the said executors executed an instrument whereby they agreed, as such executors, "to and with the heirs-at-law and devisees of said estate, to accept \$1,000, or \$500 to each, in full for all commissions as executors or trustees of said estate of G. C. Turfler which we may be entitled to, or coming to us and each of us, out of the real estate owned by George C. Turfler at the time of his demise, and situated in the city and county of New York; such sum, when paid, to be a full release of the heirs of said estate for the said real estate or the commissions we might have earned from the sale of same under said will." This arrangement seems clear and specific. It related solely to the real property, and left the remainder of the estate to be administered and disposed of by the executors in accordance with the terms of the will of the testator, and to account for the same, and to receive their commissions thereon in accordance with the usual practice, and at the rates prescribed by statute; and, so far as that portion of the estate is adjusted and settled upon this accounting, the executors' commissions must be computed and allowed accordingly.

A further question is presented, however, as to what, if any, commissions or compensation shall be awarded the executors for the disposition of the real estate. Had the executors carried out the provisions of the will by selling this real property and

distributing the proceeds thereof, it would have been entirely clear that they would have been entitled to their commissions thereon at the statutory rates. This has not been done. Pursuant to the above agreement, entered into, the real estate was not sold, and the executors do not account for the same, and have not, therefore, from a strictly legal standpoint, placed themselves in a position to claim their commissions thereon according to the usual practice and legal requirements. The executors claim, however, even admitting that to be so, that the agreement entered into entitles them to the compensation therein agreed upon. Its terms are clear and explicit in favor of their claim, and it would be a gross injustice to them to permit the parties thereto and interested in the estate to now repudiate the same, and send the parties out of court without compensation. It seems that a Surrogate's Court has power to prevent this injustice. *Paxton v. Brogan*, 10 N. Y. Supp. 563. It is binding upon the parties, and can this court give force and effect to the same? I shall so hold. The writings, having been acted upon, constitute an estoppel. They should not now, after the executors have relied and acted upon the same, and failed to sell the realty, and thus put themselves into the regular way to entitle themselves to demand their lawful commissions, be permitted to repudiate this agreement, and turn the executors away without compensation, upon a claim that the executors have not complied with the provisions of the will, and disposed of the proceeds of the sale thereof, so as, according to the usual practice and rules of law, to entitle them to demand their lawful commissions. *Ledyard v. Bull*, 119 N. Y. 62, 23 N. E. Rep. 444; *Singleton v. Smith*, 2 N. Y. St. Rep. 173. Again, it seems to me that the agreement may be regarded as one where an interested party has accepted specific articles or pieces of property in lieu of cash, in which instances the commissions are earned and allowable. *McAlpine v. Potter*, 126 N. Y. 291, 27 N. E. Rep. 475; *Code Civil Pro. sec. 2744*; *Phoenix v. Livingston*, 101 N. Y. 451-456, 5 N. E. Rep. 70. If it be objected that, in order that this may be done, it is essential that the accounting party

should set forth and state the property in his accounts, and credit himself with payment over of the same, as if the cash had been actually received and paid over, I will permit the executors to so amend and state their accounts accordingly. That seems to be the proper rule. *In re Selleck*, 111 N. Y. 234, 19 N. E. Rep. 66.

For the reasons above given for holding that the parties interested in the estate, and who entered into this agreement with the executors, are estopped from repudiating the same, I determine that the executors have waived and forfeited any further compensation than that fixed by such agreement, although it may be less than the statutory allowance would have been. *In re Hopkins*, 32 Hun, 618. The executors claim a full rate of compensation to each, on the ground that the personal estate of the testator exceeded \$100,000, and contend that, for the purpose of fixing such valuation, the real estate must be regarded as personalty. When real estate is devised to executors in trust to use and distribute the proceeds, and such sale and distribution have been actually made, the proceeds thereof will be considered personal property; and if they bring up the estate to more than \$100,000, then each executor will be entitled to the full commissions provided by Code Civil Pro., section 2736. *Smith v. Buchanan*, 5 Dem. Sur. 169. That seems to be a well-considered authority, and I am of the opinion that the rule there laid down is correct. That being so, each executor is entitled to full commissions on so much of the assets as exceed \$100,000, unless he has lost such right by failure to convert the real estate by an actual sale. The agreement as to the commissions precludes the executors from more than they have stipulated for on the \$100,000 fixed as the value of the realty. Counsel may be heard further on this question on settlement of the decree.

The executors should restate their accounts so as to exclude the items therefrom retained for commissions. Commissions are allowed only by order of court, and on the settlement of the account. Those claiming them have no authority to appropri-

ate sums to their own use, as commissions, until they are judicially allowed. *Freeman v. Freeman*, 4 Redf. Sur. 211; *Whitney v. Phoenix*, id. 180; *Wheelwright v. Wheelwright*, 2 Redf. Sur. 501; *Wheelwright v. Rhoades*, 28 Hun, 57; *Carroll v. Hughes*, 5 Redf. Sur. 337; *In re Butler's Estate* (Surr.), 9 N. Y. Supp. 641; *In re Willard's Estate*, id. 555-557.

As to the amount of \$950, claimed as a credit for the employment of a bookkeeper, I think the evidence is sufficient under the circumstances disclosed as to this estate and the administration thereof, to sustain the claim that it was proper and essential to employ a bookkeeper. There is no serious contention that the services were not worth the amount charged and paid. This entire amount, however, cannot be charged to the principal estate, nor allowed the executors on this accounting. The services of the bookkeeper were rendered for the benefit of the income estate of the widow as well as the estate held by the executors, and a portion thereof should be paid by her or her estate. This sum should be apportioned according to the extent and value of the services rendered for each estate, respectively, which may be done upon the settlement of the decree, at which time counsel may be heard thereon. The other item, of \$100, sought to be charged for services of this bookkeeper, must be disposed of upon the taxation and adjustment of the costs of this proceeding, as such services were rendered in preparing the accounts rendered in this proceeding.

The stipulation entered into upon the hearing on April 8, 1892, disposes of the \$1,250 item for counsel and attorney's charges, and the same may stand disposed of in accordance therewith.

Let a decree be presented for settlement and entry in accordance with the conclusions above set forth, costs to each party to be adjusted and inserted in the decree, payable out of the estate.

In re VER VALEN'S ESTATE.

(Surrogate's Court, Rockland County, Filed April, 1892.)

1. EXECUTORS AND ADMINISTRATORS—BUSINESS CARRIED ON BY DECEDENT AND ADMINISTRATOR.

An administrator will not be allowed to deduct from the amount of the inventoried estate, on his accounting, the value of the chattels belonging to a milk business, on the ground that the same belonged to him, and not to the estate, when it appeared that decedent (administrator's father) bought the milk route and property necessary to carry it on, and that the expenses of the sale of the property were charged to and paid out of the estate moneys by the administrator, and that it was upon a farm belonging to decedent and through the milk business that the father and son, by mutual family relations, without any definite fixing of rights, provided a livelihood and home for themselves.

2. SAME.

Such administrator is chargeable with the proceeds of the sale of the "good will" of such milk business.

3. SAME—PROFITS ON SALE OF ESTATE.

An administrator cannot make profit out of the estate by purchasing articles at an auction sale of chattels of the estate and reselling them at a profit, and on his accounting will be chargeable with the profits so made.

Settlement of accounts of Isaac Ver Valen, Jr., as administrator of the estate of Isaac Ver Valen, deceased.

Abram A. Demarest, for administrator; Garrett Z. Snider, Arthur S. Tompkins and William T. B. Starms, for contestants.

WEIANT, S.—The estate of the deceased was inventoried at \$910.50, and for this sum, less allowances for unavoidable losses, the contestants claim that the administrator should be charged on this accounting. The administrator contends that, in addition to the deductions for such losses, there should be deducted therefrom the value of all chattels and properties included in such inventory which constituted a part of the milk

business, and were therein valued at \$372, on the ground that the same were his individual property, and not a part of the estate. I think that the claim of the contestants must prevail. The evidence clearly shows these chattels and goods to have been the property of the intestate. The administrator admits that his father, the intestate, bought the horses, wagons and cans in question and inventoried, and that he paid Mr. Maroney for the milk route \$125 or \$130. He testifies that he only made one payment on the milk route, and that was \$20, to a Mrs. Partridge. He says his father made all the rest, and that most of these notes against the estate were given for borrowed money to buy this milk route or purchase the properties used therewith. He testified that he supposed that the milk route belonged to his father, because he had no papers showing it belonged to him. He inventoried this property as a part of the estate, making the usual affidavit thereto, but designated it as disputed. He paid the claim of Louis Biltz, of \$38, against the estate, and this he testifies was a difference on a wagon trade, made before his father's death, of a running gear of a milk wagon for another, which was the new one sold at the auction. This is one of the articles that he claims to have been his individual property. Further, the administrator in his accounts filed herein on October 26, 1891, charges himself with these articles, and swears to the amount accordingly without reservation or qualification. He some time subsequently, during the hearing, asked that his accounts might be amended, reducing the sum for which he should be charged to the extent of the value of these articles in question. The decision thereof was reserved, and now, in accordance with the facts, must be denied. The expenses of the sale of all this property were charged up by him to the estate, and paid out of the estate moneys. His verified accounts show this. It thus appears that all of this property appertaining to this milk business was acquired by the intestate, and that the administrator really believed and understood that he had not acquired any title to the same. Conceding, as he does, that it was all his father's at one time, to sustain his claim he must have

shown the acquisition of the property from his father in some form. This he has not done. All of the property, including the farm, belonged to the father, and it was upon this farm and through this milk business that the father and son, by mutual family relations, without any definite fixing of rights, provided a livelihood and home for themselves. I think that is the only interest this administrator had in this property and business.

The contestants also ask that the administrator should be charged with \$150, the sum for which he sold the milk route to Wood; the sum of \$50, realized by him over and above the price he paid for a wagon at the auction sale; the sum of \$10, that he received over and above the price at which he purchased a horse at the auction sale; and, also, the sum of \$17.50, being the difference between the price at which he inventoried and sold the one-half interest of a colt belonging to the estate. The facts, undisputed, are that the administrator did, after the auction sale of the inventoried property, sell the milk route, the right to serve customers, and the cans, to one Wood, for \$200; that \$50 of this price was retained to stand against tickets that the Ver Valens then had out in the hands of customers, and \$25 was the value of the cans. The cans, as I understand, are already charged against the administrator, and whatever that value is should be deducted from the \$150. The wagon in question was purchased by the administrator at the auction sale for \$10, and subsequently sold, in about three or four months, to one Tuttle, for \$55 or \$60. The horse "Doll" he also purchased, for \$165, and sold it within five or six weeks thereafter to George Lyeth for \$175. The half interest in the black colt was inventoried at \$12.50, and the colt was sold at the auction for \$41, bought in by the administrator, and subsequently sold by him for \$60. Under the rules of law and equity applicable to the rights and duties of trustees it seems clear that the administrator must account for these profits arising from the trust estate. Equitable as well as legal rules are applicable. *Upson v. Badeau*, 3 Bradf. Sur. 13. A trustee cannot make any profit to himself from a secret transaction, initiated while the relation

of trustee and *cestui que trust* exists. *Green v. Green*, 2 Redf. Sur. 408; *Gardner v. Ogden*, 22 N. Y. 327; *Mitchell v. Reed*, 61 N. Y. 123. The principle of the rule of equity which prohibits purchases by parties placed in a situation of trust or confidence is that no such person can be permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of purchaser on his own account. *Van Epps v. Van Epps*, 9 Paige, 237, *Hawley v. Cramer*, 4 Cow. 717; *Willink v. Vanderveer*, 1 Barb. 599. This rule is recognized in *Harrington v. Bank*, 101 N. Y. 259-264, 4 N. E. Rep. 346. It is there stated to be a "well-established doctrine that a trustee cannot purchase or deal in the trust property in his own behalf, or for his own benefit, directly or indirectly. This is a rule of equity, and is not to be impaired or weakened." In *Mitchell v. Reed*, *supra*, Judge EARL, writing the opinion, says, at page 126, speaking of the relations of partners:

"The functions, rights and duties of partners in a great measure comprehend both those of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. He can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested."

In *Estate of Barlow*, 15 N. Y. St. Rep. 721, it was held that the sale by the administrator of a deceased partner of his interest in the partnership property to the survivors, and the subsequent purchase by the administrator individually, is an unlawful transaction, whether or not the sale was in good faith. One executor or trustee can make no valid agreement to purchase or take the trust property at a fixed valuation from his co-executor or trustee without being liable for the profits, if any are made by the agreement. *Case v. Abeel*, 1 Paige, 393. An executor who compounds debts or buys in for less than is due

cannot take the benefit to himself. *Van Horne v. Fonda*, 5 Johns. Ch. 388. No profit can be made by executors or administrators by increase of the estate. 3 Rev. St. (5th Ed.) p. 179, sec. 63. He must answer for the true value. *Zilkin v. Carhart*, 3 Bradf. Sur. 376. As to so much of the \$150 received by the administrator on the sale of the milk route for the "right to serve customers," — may add that it appears he is chargeable for the same as an asset of the estate. It was a sale of the "good will" of the milk business that belonged to the intestate, and for whatever he may realize therefrom he is accountable. *In re Benedict*, 13 Abb. N. C. 67; *In re Randell's Estate* (July 27, 1889) (Surr.), 8 N. Y. Supp. 652; *Zilkin v. Carhart*, *supra*; *Hitchcock v. Coker*, 6 Adol. & E. 438; *Howe v. Searing*, 19 How. Pr. 14; *Gibblett v. Read*, 9 Mod. 459. Let a decree be settled and entered accordingly adjusting and settling the accounts.

In re RILEY'S ESTATE.

(*Surrogate's Court, Cattaraugus County, Filed July 6, 1893.*)

1. LEGACY—ANSWER—SUFFICIENCY.

A motion to dismiss a petition for payment of a legacy bequeathed to the executor in trust for petitioner will be denied when the written answer filed in pursuance of Code Civ. Pro. section 2805 does not contain a specific denial of the validity of the claim, and an affirmative allegation of facts showing the doubtful nature of the claim, as required by that section, but merely presents an issue as to the manner in which the trust is being executed, as to which the surrogate has jurisdiction under Code Civ. Pro. sec. 2472, subd.

2. WILL—CONSTRUCTION—LEGACY FOR SUPPORT.

A testator bequeathed to his brother \$1,000 in lieu of all claims of his brother against his estate, and appointed his son trustee of the bequest "to use it for the comfortable support of my said brother, and to pay his funeral expenses," and if any part should remain after the decease of his brother, to divide same amongst testator's sons and daughters. *Held*, that the will neither expressly nor impliedly con-

ferred upon the trustee any authority over petitioner's person, and that he could not compel the latter to reside with him, nor dictate as to where he should reside.

3. SAME.

The petitioner was entitled to demand and receive from the trustee such portion of the legacy as was necessary for his support, without regard to the question of his ability to support himself.

4. SAME.

As the will did not authorize the trustee to determine the amount to be paid for the support of the beneficiary, and did not authorize the beneficiary himself to determine the amount, such amount should be fixed by the court.

Petition to compel payment of legacy. Granted.

T. H. Dowd, for petitioner; M. B. Jewell, for trustee.

DAVIE, S.—The will of James Riley, deceased, was admitted to probate by the Surrogate's Court of Cattaraugus County on the 21st day of September, 1891, and letters thereupon issued to James J. Riley, executor. The will, among various other bequests, contains the following:

"I give and bequeath to my brother, John Riley, the sum of one thousand dollars; said sum of one thousand dollars to be in lieu of, and in full for, any claim that my said brother may have, or claim to have, against me or against my estate, after my decease, and, if not accepted by him in lieu of any such claim, said bequest to become a part of my residuary estate. I hereby appoint my son, James J. Riley, sole trustee of said bequest, without bonds, to take charge of said sum of one thousand dollars, and to use it, for the comfortable support of my said brother, and to pay his funeral expenses; and, if any part of said sum shall remain after the decease of my said brother, said residue or remainder shall be divided equally between my son and daughters."

On the 29th day of May, 1893, the legatee, John Riley, filed his petition under section 2804, Code Civil Pro., alleging among other things, that the said executor and trustee had failed and

refused to provide a comfortable home for the petitioner, and to pay him any money from said legacy with which to provide himself a home. On the return of the citation the trustee appeared, and filed an answer in writing, duly verified, denying the charge of neglect and refusal to provide for the petitioner, and alleging "that he has provided, and been willing to provide, sufficient funds and a home for the said John Riley, and all things sufficient and proper for his comfort and support according to his station in life, but that said John Riley insists on going away from home, and being influenced by the advice of others, who want the funds which may be procured by the petitioner;" and thereupon the said trustee moved for a dismissal of said proceedings, pursuant to the requirements of section 2805, Code Civil Pro.

The determination of the jurisdictional question thus raised was reserved until the final submission of the case, and is now the first subject claiming consideration. The section of the Code referred to (2805) provides that if, upon the return of the citation, an answer in writing, duly verified, be filed, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality absolutely, or upon information and belief, a decree must be made dismissing the petition. The requirements of an answer under this section are the same as under section 2718, where a creditor files a petition to compel the payment of a debt. The character of its contents is distinctly defined. It must contain both a specific denial of the validity of the claim, also an affirmative allegation of facts showing the doubtful nature of the claim. An answer denying the validity of the claim, without alleging the facts, is insufficient. *In re Macauley*, 94 N. Y. 574. So is an answer which alleges the facts without the denial of validity. *Lambert v. Craft*, 98 N. Y. 343. The answer filed in this proceeding is insufficient, in both form and substance, to divest the surrogate of jurisdiction. It contains no distinct denial of the legality or validity of the claim, nor does it deny the execution or probate of the will, or the existence or

validity of the trust. It does not allege an insufficiency of funds, or any other valid reason for not performing the trust in accordance with the spirit and intent of the bequest. It simply alleges, in substance, that the trustee has performed, and is willing to perform, the duties of the trust. The only issue presented by the answer relates to the manner in which the trust is being executed, and that is a matter peculiarly within the jurisdiction of the Surrogate's Court. Express authority is conferred upon Surrogate's Courts to direct and control the conduct of testamentary trustees (section 3472, subd. 3); and to hold that an answer which simply puts in use the conduct of the trustee ousts the court of jurisdiction would render the provisions of the Code, last above cited, practically nugatory. The motion to dismiss the petition herein must be denied, and the case disposed of upon its merits.

The petitioner, who is now of the age of about 60 years, having no family of his own, had resided with the testator for several years prior to the decease of testator. After his death the trustee, who is one of the principal legatees under the will, continued to maintain the homestead, and petitioner resided with him continuously until the 25th of May, 1893, and during such period was reasonably well supplied with the comforts of life by the trustee. On that day, however, an altercation took place between petitioner and the trustee, and, in consequence, petitioner went to reside with a brother in the village of Salamanca. The attitude of the trustee in this matter, which perhaps is not so distinctly indicated by the answer as by the evidence produced upon the trial, is that he is willing to support and maintain petitioner at his own home, but that he is unwilling to advance any money out of said legacy to procure support for him elsewhere. The trustee asserts that he is clothed with a discretion as to the particular manner of executing this trust, and that his requiring the petitioner to reside with him is only a reasonable and legitimate exercise of such discretion, with which the court should not interfere. It is undoubtedly true that, where a trustee is given a discretion as to the method of

performing the trust, courts will not ordinarily interfere with a reasonable use of such discretion; but the claim of the trustee in this case is neither sustained by law, nor consistent with the equities. It is quite apparent that the legacy to the petitioner was not a gratuity prompted by love and affection, but a legacy in satisfaction of a debt. Hence, if there was any ambiguity in the terms of the bequest, it should receive a liberal construction in favor of the petitioner. But no such ambiguity exists. The will neither by its express terms nor by implication confers upon the trustee any authority over the person of the petitioner, nor does it give him the right to dictate as to where the petitioner shall reside. The bequest of the \$1,000, or so much thereof as may be necessary for the maintenance of petitioner during life, is absolute, not dependent to any extent upon his place of abode. Petitioner has the free and unrestricted right to reside where he desires. *Forman v. Whitney*, 2 Abb. Dec. 163.

The petitioner is entitled to demand and receive from the trustee such portion of said legacy as is necessary for his support and maintenance, without regard to the question of his ability to support himself. *Holden v. Strong*, 116 N. Y. 471, 22 N. E. Rep. 960.

The will, in this case, does not make the trustee the judge of the amount required by the petitioner for his support, nor does it make the petitioner himself the judge of his own necessities. Where a will does not authorize the trustee to determine the amount to be paid for the support of the beneficiary, and does not authorize the beneficiary himself to determine the amount, such amount should be fixed by the court. *Bundy v. Bundy*, 38 N. Y. 410. The petitioner is a man of usually good health for one of his age, and at the present time undoubtedly capable of contributing to some extent, by his own exertions, to the expense of his maintenance. It does not appear that he has any property, aside from the avails of the legacy. Consequently, a proper regard for his future welfare and comfort dictates an economical management of this fund, and no greater amount

should be directed to be paid to him than actually necessary; and I am satisfied, from the evidence in the case, that the sum of \$150 per annum will be sufficient. And in fixing the limit at the comparatively small sum named I have considered the interests of the petitioner, alone, and not, to any extent, those of the residuary legatees, who are entitled to take whatever may remain of this fund after the death of the petitioner.

The evidence given upon the trial was largely directed to the conduct of the parties on the 25th of May, 1893, when the difficulty arose between them; the petitioner claiming that the trustee, on that occasion, assaulted and beat him without reason, and the trustee, on his part, denying such charge, and asserting that such injuries as the petitioner then received were occasioned by his intoxication. The evidence is very contradictory, and by no means satisfactory, upon this subject; but it is of little consequence who was the party in fault at that time, so long as it now appears that the feeling of ill will thereby engendered, and still existing, between the parties, would render the home of the trustee by no means a congenial place of abode for the petitioner, and affords an additional reason for holding that the support and maintenance of the petitioner is not dependent to any extent upon the continuance of his residence with the trustee.

The amount to which the trustee is entitled on account of expenses incurred in the support of the petitioner will be adjusted and allowed to him upon his judicial settlement as such trustee, and in the meantime the trustee should file in the office of the surrogate an annual account of his proceedings as such trustee, and should also set apart the balance unexpended of this legacy, keeping the same invested, so far as practicable, for it is more than likely that the trustee would be required to account for interest upon this fund in case the principal proves insufficient for the support of petitioner during his lifetime.

In re ODELL'S ESTATE.

(Surrogate's Court, Westchester County, Filed March, 1893.)

WILL—CONSTRUCTION.

A testatrix bequeathed a portion of her estate upon trust to pay the income to her nephew William for life, and upon his decease to pay the principal to his daughter Ella should she survive him, but in the event of her decease without issue her surviving, "subject to the trust hereby created," the principal was to be paid to her two nieces and a grandnephew. *Held*, that the time of the death of Ella referred to her death without issue pending the trust, that is, during her father's lifetime, and as she had survived him, and the trust was therefore ended, she was entitled to the principal absolutely.

Proceeding to construe the following clause of the will of Ophelia P. Odell, deceased.

"Eleventh. I give, devise and bequeath unto my executor hereinafter named one undivided one-fourteenth part or portion of my estate in trust, nevertheless, to collect, receive, and invest the same, and out of the rents and proceeds thereof to pay over the interest and income thereof to my nephew William P. Slater for and during the period of his natural life; and upon his decease I give, devise and bequeath said one-fourteenth part or portion of my said estate unto Ella Slater, daughter of my said nephew, William P. Slater, should she survive him; to have and to hold the same to her, her heirs and assigns, forever. In the event, however, of the decease of the said Ella Slater without issue her surviving, subject to the trust hereby created I give, devise and bequeath such undivided one-fourteenth part or portion unto my said nieces Emma Caswell, Caroline Smith and Ophelia Weeks, share and share alike; to have and to hold the same unto them and each of them, and to their heirs and assigns, forever."

Mitchell Levy, for executors; Calvin Frost, for Charles J. Smith, general guardian of Ella Slater; Thomas J. Purdy, for Caroline Smith, etc.

COFFIN, S.—The question to be determined is whether the

one-fourteenth part of the estate of which William P. Slater had the use for life now belongs to his daughter, Ella, sometimes called Mary Ella, absolutely, or to the executors to hold until it shall be determined whether she shall die without issue; in other words, whether it shall be decreed to be paid to her general guardian or to be retained by the executors. Counsel have, in their briefs submitted, discussed the question, among other things, as to whether the time of the death of Ella Slater referred to her death without issue during the lifetime of the testatrix or subsequent thereto. The learned counsel for the general guardian has cited many authorities to sustain the affirmative of the proposition, and, among others, the cases of *Livingston v. Greene*, 52 N. Y. 118, and *Quackenboss v. Kingsland*, 102 N. Y. 128, 6 N. E. Rep. 121, which appear to sustain that view. In behalf of the claim of Caroline Smith and others, their counsel has cited some decisions of courts of other States, to which access has not been had, as supporting that claim. Not much consideration has been given to this question, for the reason that the matter is determinable upon another ground, taken on behalf of the general guardian, which seems quite unanswerable. In construing wills it is well stated that the intention of the testator, when discoverable, must control. Here that intention, gathered from the will itself, appears to be perfectly plain. The use of the share is given to Ella's father for life, with remainder to her absolutely; but, should she die without issue pending the trust—in other words, while he was alive, then to Caroline Smith and others, subject to the same trust. But Ella has not died without issue subject to the trust, nor can she, seeing that the trust no longer exists; so that the distribution of this fourteenth among the other three is impossible of accomplishment. It was given to Ella absolutely if she survived her father, the *cestui que trust*, but, in case she died without issue during his lifetime, it should go to the others at his death. But he is dead. The trust is ended. Ella survives, and she takes the share absolutely. Such is in accordance with the plain intention of the testatrix. The decree will direct that the share be paid to her guardian on his filing the usual bond.

In re HATHAWAY'S ESTATE.

(Surrogate's Court, Cortland County, Filed July 13, 1893.)

1. EXECUTORS AND ADMINISTRATORS—LEAVE TO ISSUE EXECUTION.

An order will not be made for leave to issue execution upon a judgment obtained against an administrator for a debt due by decedent, under Code Civ. Pro. sec. 1825, providing that an execution shall not issue against an administrator in his representative capacity unless an order permitting it to issue has been made by the surrogate from whose court the letters issued, which order shall specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum, when it appears that the administrator fully accounted for all the assets which came to his hands, and there was no property of the estate in his hands, more especially when Code Civ. Pro. sec. 2552, provides that an order permitting such an execution to issue is, except upon appeal therefrom, conclusive evidence that the administrator has sufficient assets to pay the amount of the execution.

2. SAME.

In such case it is not essential, in an action brought by the petitioning creditor to set aside fraudulent conveyances of property made by the decedent, that the complaint should allege the issuing of execution upon the judgment against the administrator, nor is the fact that the execution has not issued a bar to the action, but if otherwise, some other authority should be given the surrogate to permit the execution to issue.

3. SAME.

Even if the court could issue such an order under the circumstances, facts should be presented which would enable the court to make an order specifying the amount that should be paid upon the judgment, or the *pro rata* share to which the petitioner would be entitled.

Application by a creditor of decedent for an order under Code Civ. Pro., section 1825, permitting execution to issue on a judgment obtained by petitioner against the administrator for the amount of his debt. Denied.

Horace L. Bronson, for petitioner; Kellogg & Van Hoesen, for administrator.

EGGLESTON, S.—Calvin L. Hathaway, of Solon, Cortland

County, N. Y., died August 15, 1885, intestate. Upon the 7th day of October of that year Riley Champlin was appointed administrator of his estate, duly qualified, and entered upon the discharge of his duties as such administrator. May 6, 1891, the administrator, upon his application, had a final accounting before the surrogate, and was discharged from further duty or liability in the matter. At the time of the accounting, it appeared that the estate was insolvent, and, upon the final distribution of the assets of the estate, the same were paid upon certain judgments rendered against Hathaway in his lifetime, which judgments were entitled to a preference in payments. The majority of the creditors received nothing upon their claims. June 30, 1891, Platt Peck, the petitioner herein, obtained a judgment against Riley Champlin, as administrator of the estate, for the sum of \$6,625.60, which judgment was duly docketed in the clerk's office of Cortland County. The judgment obtained against the administrator was for an indebtedness which was created by the intestate during his lifetime. Execution was never issued upon the judgment, and nothing has ever been paid upon the same. Upon the accounting before the surrogate, Peck, the petitioner, who was a creditor of the estate, having been duly cited, appeared with others, and filed objections to the account of the administrator; but subsequently he, with the others, withdrew the objections, and the accounting was had without objection, and a decree entered discharging the administrator from further duty or liability in the matter. The petitioner now asks for an order or leave to issue execution upon said judgment, alleging in his petition recovery of the judgment, and upon his information and belief, that the administrator has in his possession or under his control personal property belonging to the estate, and also alleging that Hathaway, prior to the time of his death, had made fraudulent conveyances of his real estate to other persons for the purpose of cheating and defrauding his creditors, and that petitioner is desirous of bringing an action to set aside such alleged fraudulent conveyances and transfers of property; that he is advised and believes

that an execution must issue and be returned unsatisfied upon the judgment as a condition precedent to the bringing of an action in equity against the persons to whom it is alleged the fraudulent conveyances and transfers were made. Upon the return of the citation issued in this proceeding against the administrator to show cause why an order should not be made that execution issue, the administrator interposed an answer, alleging the fact of the accounting had before the surrogate, the settlement of his account, and his discharge as such administrator. The answer admits the rendering of the judgment against the administrator as alleged in the petition, and further alleges that the administrator has paid out, in the due administration of the estate, all the moneys in his hands, and that the same have been paid in accordance with the sanction and direction of the court. There is no claim that the administrator has any property or funds in his hands belonging to the estate, or that he has not fully accounted for all of the property or assets of the estate which came into his hands as such administrator, and it was conceded upon the argument by the attorneys for the petitioner that the administrator has accounted for the assets of the estate which came into his hands, and that he has not now in his hands any property belonging to the estate of the deceased.

The only question to be determined here is: Do the facts presented in the papers upon this application justify the making of an order permitting execution to be issued upon the judgment against the administrator? No proof in support of the allegations in the petition was made upon this application before the surrogate. By section 1825 of the Code of Civil Procedure it is provided as follows:

“An execution shall not be issued upon a judgment for a sum of money against an executor or administrator in his representative capacity until an order permitting it to be issued has been made by the surrogate from whose court the letters are issued. Such an order must specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum.”

The section just quoted should be considered in connection with section 2552 of the Code, which reads: "A decree directing payment by an executor, administrator, or testamentary trustee to a creditor of, or a person interested in, an estate or fund, or an order permitting a judgment creditor to issue an execution against an executor or administrator, is, except upon appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue."

It is difficult to see from the papers in this case, considered in the light of the concession made—that the administrator has fully accounted for all of the assets which came into his hands—how such an order as the one sought for can be made. It is argued by the counsel for the petitioner that while they do not seek to reach any property in the hands of the administrator, and while they do not claim that there is any property in his hands belonging to the estate, it is necessary to obtain an order for such execution to issue, and that execution should be issued upon the judgment before an action can be brought by a judgment creditor to set aside the transfers alleged to have been fraudulently made by the intestate in his lifetime; and the order is sought only for the purpose of avoiding the decisions of the court making it necessary that such an order should be obtained before the court can have jurisdiction of the action. The case of *Lichtenberg v. Herdtfelder*, 33 Hun, 57, cited by the counsel for the petitioner, seems to be an authority in point in support of their position upon this motion. In that case the court, at General Term, held that, as no execution had been issued upon the judgment, the action brought to set aside certain fraudulent conveyances of real estate made by the deceased in his lifetime could not for that reason be maintained. Upon a review of the same case in the Court of Appeals, found in 103 N. Y. 302, 8 N. E. Rep. 526, the court seemingly does not concur in the decision made at the General Term upon that point, and Justice EARL, in his opinion, says: "At the General Term, as appears

from the opinion there pronounced, the judgment was affirmed because no execution had been issued upon plaintiff's judgment. We think this action is without precedent, and that the judgment should be affirmed, but not for the precise reason stated in the court below."

It is to be regretted, especially in view of the fact of the dissenting opinion of Justice DAVIS in the case at General Term, that the Court of Appeals, upon review of the case in that court, did not more fully explain to what it referred when it stated that the action was "without precedent," and in some way pass directly upon the question decided at General Term.

Why is it necessary that execution should issue upon the judgment obtained against the administrator of Hathaway before an action can be brought by a judgment creditor for the purpose of setting aside any conveyances claimed to have been fraudulently made by Hathaway in his lifetime? Certainly, the administrator was not a party to such conveyances, nor can he be held liable in any way for any act done by the intestate, nor does he have any interest in or control of the real estate of the deceased, unless it becomes necessary to sell the same under the direction of the court to pay the debts against the estate. Then, again, the administrator has accounted for all the personal property that came into his hands as such administrator, and there is nothing in his hands that can be reached by execution. If there were assets remaining in his hands for which he should account, or if there were assets belonging to the estate, then such proceedings should have been had in Surrogate's Court as would tend to bring the property into that court for distribution upon the final and judicial settlement of the estate; but, as it is not claimed that there is any personal property in the hands of the administrator for which he is accountable, that question is of but little importance here.

It will be observed that the judgment was obtained against the administrator in his representative capacity, and is not a judgment rendered against Hathaway in his lifetime. By section 1823 of the Code it is provided that "Real property which

belonged to a decedent is not bound or in any way affected by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made by its terms a lien upon specific real property therein described, or expressly directs the sale thereof."

Executions authorized by section 1825 of the Code are such only as can be issued against personal assets which are in the possession or under the control of the executors or administrators, and have no relation whatever to real estate. 103 N. Y. 306, 8 N. E. Rep. 526. Upon what theory, then, can it be claimed with any force that, in order to maintain an action to set aside such conveyance, it shall be necessary to have an execution issued upon a judgment such as was rendered against the administrator? It seems to me it would be as idle a ceremony as could be imagined, involving considerable labor that would be absolutely useless. "It is a maxim of law and of equity that it will not demand a vain thing." If it is the law that in cases like this it is incumbent upon a party bringing an action to set aside alleged fraudulent conveyances, to show that an execution has been issued upon a judgment rendered against an administrator, then some authority other than as provided for now should be given the surrogate to make such an order, and permit the execution to issue for that purpose. That a party should be permitted to bring his action goes without saying, and he should not be deprived of that right by any obstacle which he is utterly unable to overcome. He makes his application to the Surrogate's Court for the order, and that court is unable to make the order, for the reason that there are no assets or property belonging to the estate in the hands of the administrator. By the sections of the Code referred to, the order must specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum; and when that order is made, unless the same is appealed from, it is conclusive evidence that there are sufficient assets in the hands of the administrator to satisfy the sum which the decree directs him to pay, or for which the order

permits the execution to issue. Such an order would be unjust to an administrator who had faithfully performed his duties, and accounted for all the assets which came into his hands, and might place him in contempt, as the only alternative he would have would be to appeal or to pay. Before the surrogate can make the order, he must find that there are assets in the hands of the administrator sufficient to pay the sum for which an execution is authorized to issue. Possibly, the order might be made that the execution issue for nothing, as that would be the only reasonable order that could be made in fairness to the administrator. The case of *Adsit v. Butler*, 87 N. Y. 585, cited by the counsel for the petitioner, is not a case in point, as in that case judgment was obtained against the testator in his lifetime; though I am unable to see, even if the judgment in question had been obtained against Hathaway in his lifetime, under the existing circumstances, how the order asked for upon this application could be made.

Another and further reason might be urged why this order should not be made upon the papers presented. At the time of the final settlement of the estate, it appeared that the assets of the estate were inadequate to pay the claims against the estate, and certain of the creditors, having a priority of payment of their claims, received nothing upon the same. There is no proof in this proceeding of the amount of the claims remaining unpaid, nor is any evidence given from which to determine the amount which the petitioner would be entitled to receive upon his judgment. Even if there was property in the hands of the administrator which could be reached under an execution, the petitioner would only be entitled to a *pro rata* share of the same, and that, too, after the judgments and claims having a priority had been paid. No facts are presented which would enable the court to make an order specifying the amount that should be paid upon this judgment, or the *pro rata* share that the petitioner would be entitled to. Assuming that there was \$6,625.60 in the hands of the administrator undisposed of, it could not be claimed that an order should be made that an execu-

tion issue in favor of the petitioner against the administrator for the collection of that sum, as the petitioner would not be entitled to that amount. Other creditors would be entitled to a portion of the money at least, and the petitioner would obtain no right to the money from the fact that he had been vigilant in attempting to recover the same, nor would he have any claim to the money over and above the rights of the other creditors.

For the reasons stated, the application for an order that execution issue should be denied, and I come to this conclusion more willingly for the reason that I do not deem it essential, in an action brought by the petitioner to set aside any alleged fraudulent conveyance of property made by Hathaway in his lifetime, that the complaint must allege the issuing of an execution upon the judgment rendered against Champlin, the administrator; nor do I deem the fact that such execution has not issued any bar to the petitioner's right to maintain the action, if the action can otherwise be successfully prosecuted to judgment.

In re JONES' ESTATE.

(Surrogate's Court, Onondaga County, Filed March, 1893.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—JURISDICTION.

Surrogates' Courts have power under Code Civ. Pro. sec. 2472 (providing that such courts may, upon an executor's accounting, construe the provisions of a will whenever necessary to make the decree as to distribution), to determine as to the validity of an antenuptial agreement made by decedent and his intended wife, made in contemplation of death, whose subject matter is the distribution of his property after his death.

2. ANTENUPTIAL CONTRACT—FRAUD—BURDEN OF PROOF.

The presumption is against the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith, and strict proof will be required, especially where the provision for the widow is inequitable.

3. SAME.

Decedent, when 70 years of age, married his deceased wife's niece, aged 52. He was then worth \$20,000. Prior to the marriage he had an agreement drawn up by his attorney by which his intended wife was to receive on his death \$2,000 in lieu of dower and interest in decedent's personal estate. This was signed by decedent and his wife the evening prior to the marriage, and there was no evidence of prior negotiation in reference thereto. The wife testified it was not read to her, and she only became aware of its contents after the marriage, and decedent admitted to several persons that in having the paper signed he wished to convince his sisters that his wife had not married him for his money. *Held*, that although the wife had subsequent to the marriage acquiesced in the agreement, the burden of proof which the law placed upon the husband's representatives to show perfect good faith had not been met with, and the agreement was invalid.

Judicial settlement of the accounts of George A. Warburton, as administrator of the estate of William Jones, deceased.

Brooks & Walrath, for administrator; Fuller & Glen, for widow and contestant.

GLASS, S.—This is a proceeding upon the petition of George A. Warburton, administrator of the estate of William Jones, for the final judicial settlement of his accounts, and for the distribution of the surplus of the estate among the persons entitled thereto. The intestate died on the 31st day of August, 1890, at Camillus, in this county, leaving him surviving no descendant nor parent, but leaving him surviving Margaret A. Jones, his widow, and two sisters, residing in this county, and three nephews and a niece, children of a deceased sister, residing in England, his only next of kin, all of whom are parties to this proceeding. In the account filed the administrator charges himself with the sum of \$23,954.66 in cash and good securities, and credits himself with having paid out for debts, taxes, funeral expenses, and expenses of administration the sum of \$1,317.72, and also with having invested the sum of \$2,000 in a certain bond and mortgage to secure the payment of an annuity to the widow, in supposed pursuance of the terms of an antenuptial agreement hereinafter referred to. The administrator,

in his petition, which is the basis of this proceeding, among other things, alleged: "That said decedent, William Jones, in contemplation of his marriage with his said surviving widow, Margaret A. Jones, entered into an antenuptial bond, duly sealed and acknowledged by them, under and by the terms of which said widow was to receive, after the death of said William Jones, from his estate, in case she survived him, interest of \$2,000, payable annually, in lieu of all right of dower or interest in said decedent's personal estate, which said bond is hereby referred to and made a part of this petition."

Upon the return of the citation, the widow appeared specially, objecting to the distribution of the estate in this proceeding, principally because the alleged antenuptial bond was void for want of due execution, and because of the practice of fraud upon her at the time of its execution, and alleging that she had commenced an action to set aside the said agreement, and to have the same declared null and void, and asking for a postponement of this proceeding until the determination of an action which she had commenced in the Supreme Court to have said bond declared null and void. Such postponement was made for some months, but it appears that the Supreme Court action was subsequently discontinued, and the widow appeared generally in this proceeding by her attorneys, and filed an answer raising objections to sundry items of the account, and, among others, to the above-mentioned item of \$2,000, invested for the benefit of the widow, and alleging the invalidity of the said antenuptial agreement, because, among other things, of fraudulent misrepresentation and concealment of its contents practiced upon her by the intestate at the time she signed it. Upon the hearing, no objections raised by the widow's answer were pressed, except those relating to the validity of the antenuptial agreement, which would necessarily include the \$2,000 item above referred to. A considerable amount of testimony was taken upon that issue, and at its close the petitioner's counsel raised the objection that this court had no jurisdiction to determine as to the validity or invalidity of the antenuptial agreement in question; so that,

practically, the principal questions now to be decided are: First, has this court jurisdiction in this matter to adjudicate as to the validity of the antenuptial agreement? Second, is the antenuptial agreement valid and binding upon the widow so as to cut her off from what would otherwise be her distributive share of the estate?

The question raised as to jurisdiction is a serious and perplexing one. If this court has the power in this proceeding to determine as to the validity of the agreement in question, it is a power implied from and incidental to the authority conferred by section 2472 of the Code of Civil Procedure upon the Surrogates' Courts, "to direct and control the conduct and settle the accounts of executors, administrators, and testamentary trustees;" to enforce the * * * distribution of the estates of decedents." That this section of the Code confers power upon Surrogates' Courts in a proceeding having for its object the settlement of an executor's accounts, and the obtaining of a decree directing the distribution of a fund in his hands, when all the parties in interest are present, to construe the provisions of a will, and determine their meaning and validity, whenever necessary in order to make the decree as to distribution, is now settled beyond all question. *Garlock v. Vandevort*, 128 N. Y. 374, 28 N. E. Rep. 599; *Riggs v. Cragg*, 89 N. Y. 480. And if the provisions of a will may be construed, and their validity determined, by the Surrogate's Court, why, upon principle and by analogy, may not a like jurisdiction extend to the construction or determination as to the validity of an agreement made by the decedent, and the person who is to become his wife, and possibly his widow, signed by the decedent himself, made in contemplation of his death, whose very subject matter is the distribution of his property after his death? The similarity in these respects between an antenuptial agreement and a will seems to suggest a reason why the numerous cases cited by the petitioner's counsel holding that the Surrogate's Court has no power to determine as to the validity of a release by a legatee or next of kin to the executor or administrator, or of an assignment of

a legacy or distributive share to a third party, may not be applicable to the present case. In all of those cases, as I remember, the instrument, agreement, or deed whose validity the surrogate was held to have no power to determine was one made, not by the testator in contemplation of the future distribution of his property, but by other persons, after his death. But whatever doubts I should otherwise have as to my jurisdiction to adjudicate upon the validity of the instrument in question, the case of *Pierce v. Pierce*, 71 N. Y. 154, seems to be decisive upon the question, and seems to leave no way open but for me to hold that this court has jurisdiction in this proceeding to determine as to the validity of the instrument in question. That was a proceeding precisely like this, before the surrogate of Delaware county. Upon the final accounting of the administratrix of one Pierce, the validity of an antenuptial agreement made by the intestate with his intended wife was in question before the surrogate. The widow, upon the accounting, maintained that the agreement was void for fraud practiced upon her which induced her to sign it. The surrogate held the agreement to be valid and in full force, and that for that reason she was not entitled to a share as his widow in the distribution of his estate, and only allowed her the amount named in the agreement. The General Term of the Supreme Court, upon appeal, held that the agreement was invalid, by reason of the fraud perpetrated upon the wife, and modified the decree of the Surrogate accordingly, and allowed to the widow her distributive share of the estate, and the judgment of the General Term was affirmed by the Court of Appeals. It seems to follow as a necessary and logical conclusion that the Court of Appeals must have considered that the surrogate had the jurisdiction when the proceeding was before him, to make the same determination in the case which the Supreme Court made upon appeal to it. I do not feel at liberty to disregard the authority of the case of *Pierce v. Pierce*, and therefore hold that this court has jurisdiction in this proceeding to determine as to the validity of the agreement in question.

The agreement substantially provided that, in consideration

of the payment of the interest on \$2,000 annually during her life to the intended wife, she relinquished all dower and all interest in the personal property of her intended husband in case she survived him. The intestate was at the time of the marriage worth at least \$20,000, and she thought him worth, as she swears in answer to the question of the petitioner's counsel, \$40,000. She was at the time 52 years of age, and he was 70. She was a niece of his first wife, who died in 1869. She had known him as her uncle by marriage for 40 years or more, and during her aunt's lifetime was accustomed to visit in the family about once in two years, and stay a month or so at a time, but from 1872 to 1885 it appears her visits ceased entirely. In the fall of the latter year she made a visit of a week's length at her uncle's house, which apparently led to a mutual agreement to marry, as arrangements were made that the marriage should take place on the following 13th of January, at her brother's home in Saratoga Springs, where she made her home. Before leaving for Saratoga Springs he had procured the agreement in question to be drawn up by Mr. Lybault, his attorney at Camillus, and as drawn up by Mr. Lybault it was a complete instrument in all its details, even to the insertion of the date of the instrument, which was written the 13th of January, the proposed wedding day. He took it with him to Saratoga Springs, where he arrived at her brother's house early in the evening of January 12th, and after an interview alone with his intended wife, when, presumably it was signed by both of them; later in the evening, together with her, acknowledged the execution of it before a notary who had been called in for that purpose. This acknowledgment was taken in the presence of the widow's brother and other members of his family, but nothing was said by any one at the time of the acknowledgment as to the object or contents of the paper, except that, before the notary left, the decedent told him that he was "doing well by Maggie." He had also earlier in the evening, while asking the widow's brother to procure a notary to "take the acknowledgment of a paper of a matter between himself and Maggie," told the brother that he

was "going to fix Maggie nicely," and had also told the brother's wife earlier in the evening, while waiting for the notary, that he was going to give his wife \$2,000. The paper was presented by him to the notary already signed, and, after the notary had filled out and signed his certificate of acknowledgment, was taken possession of by the decedent, and he put it in an envelope into his pocket. How long he kept it does not appear clearly, but it is apparent that for several months at least, soon after the marriage, it was in the possession of the wife, but, as she claims, in a sealed envelope. She testifies that she never read the paper or heard it read, and the earliest date which the evidence tends to impute knowledge to her of the contents of the paper, aside from such presumptions as flow from the fact of signing and having possession of the writing, is the summer after her marriage.

The essential fact to be determined is, what took place between these parties when the instrument was signed by them which led to its being signed by Mrs. Jones? The one party is not here to give his version of the transaction; the lips of the other are closed by the wise mandate of the law; and we are left in the solution of this somewhat vexatious question to depend upon other and not always the most satisfactory kind of evidence. Without attempting to further detail the circumstances leading up to and attending the execution of this antenuptial agreement, or the relations of the parties prior or subsequent to their marriage, in January, 1886, or the circumstances disclosed by the testimony tending to prove or disprove knowledge on the part of the widow, even before the death of Mr. Jones, of the terms of the agreement, I am convinced by the proofs in the case that at the time the paper was signed, Mrs. Jones did not know its contents; that its contents had been fraudulently concealed from her by the intestate; and that she was induced to sign it by representations made to her by the intestate at, or shortly prior to, its execution, that it contained provisions more favorable to her, than it did in fact contain. In the first place, the very terms of the contract itself, viewed in the light of the

surrounding circumstances, arouse the suspicion that she did not know what she was signing when she signed this paper. It is apparent that the marriage was one based not entirely upon sentiment, and it is fairly deducible from the facts that the bettering of her financial condition may very naturally and very properly have been one of her motives in entering into this relation. He was worth \$20,000, and it is safe to say her estimate of his possessions was not smaller than that sum. With these circumstances in mind, it is hard to believe that she would have knowingly agreed to accept so comparatively trifling a sum as the interest on \$2,000 during her lifetime as her share of the estate, in case she should survive him. The fact, too, that he had the contract drawn up complete in every detail, even to its date, before he started for Saratoga, leaving nothing open for negotiation between himself and the other party when he should meet her, is also a significant circumstance in the case. It may be, of course, that the details of the agreement had previously been settled between the parties, but there is no evidence in the case showing any prior meeting of the parties more recent than the occasion of her week's visit to Camillus in the fall of 1885; so that no opportunity was afforded for such prior negotiation, except through the mails or through third parties; and there are no suggestions either of correspondence or of the intervention of third parties in the case.

The statements made by the deceased to George Langdon and to Mr. Corey, the notary, at the time the paper was being acknowledged, that he was "going to do nicely by Maggie," and to Mrs. Langdon, that he was going to give his future wife \$2,000, I am forced to believe, were made by him for the purpose of warding off scrutiny on the part of the relatives into the contents of the paper. I can hardly believe that Mr. Jones himself felt that the provision which the agreement made for his widow was a liberal or adequate one. But, if three reputable witnesses in this case are to be believed, the decedent, in his lifetime, made admissions relating to this contract and the circumstances attending its execution which, with the other facts of

the case, leave no room for doubt but that the intended wife was deceived into signing this paper by the intended husband's fraudulent concealment of the contents of the writing, and partly, at least, by his representation to her that his purpose in having the instrument signed was to show to his sisters, to convince them that she did not marry him for his money, by way of reconciling them to his remarriage. Miss Frances Langdon, a sister of the widow, testified that on the evening the paper was signed, at her brother's house, in Saratoga Springs, and after it was signed and acknowledged before a notary, she (the witness) and Mr. Jones and his intended wife were sitting in the back parlor, conversing on general topics, when her sister spoke up, and, addressing Mr. Jones, said, "William, I ought to have read that paper before I signed it;" and that he said, "Margaret, that would make no difference; it is a paper that I have had drawn up to show my sisters that you have not married me for my money, but it will never make any difference to you." Mrs. Frances M. Oliver testifies to a conversation had at her house in Syracuse, between herself and the deceased, after the marriage and after the separation of the parties, in which she asked the decedent if his wife realized that she was signing away her rights when she signed this paper, and he said, "No; she didn't." "And I asked him if he said to her that he only asked her to sign that paper to satisfy his sisters that she didn't marry him for his money, as they thought she did, and he said he did, and that she shouldn't lose anything by it." And, again, Margaret A. Clark, a former matron of the "Home" in this city, testifies that on an occasion, when Mrs. Jones was staying at that institution, after her separation from her husband, Mr. Jones came there to request of her (Mrs. Clark) to use her influence to persuade Mrs. Jones to accept a certain sum as a weekly allowance, and in the course of the conversation Mrs. Clark asked him: "Did you ask Margaret to sign a paper, or did she sign a paper the night before she was married? He said 'Yes.' I said, 'For why and for what?' He says, 'I wished to convince my sisters that she was not marrying me for

my money.' I said, 'Did Margaret know what she was signing when she signed that paper?' The first time I asked the question he shook his head, and didn't speak. Then I asked it again, and he said 'No.' " These admissions, made by the intestate to three different persons, on three separate occasions, are absolutely inconsistent with the existence of good faith on his part in dealing with his intended wife on the occasion of his securing her signature to the instrument in question, and they go a great way in leading me to believe and to find that the intestate fraudulently concealed from his intended wife the full import and contents of the paper which she signed. The law applicable to these facts is furnished by the same case (*Pierce v. Pierce*, 71 N. Y. 154), as follows: "While an antenuptial contract by which the future wife releases all claims against the estate of her husband upon his decease will be sustained when fairly made, yet, from the confidential relations between the parties, it will be regarded with the most rigid scrutiny; and, where the circumstances establish that the woman has been deceived, or induced by false pretences to enter into the contract, it will be held null and void. It seems that the presumption is against the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith, and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate."

Judging the facts in this case by this standard of legal principles, it may safely be said that so much suspicion has been cast upon the transactions which resulted in the signing of this paper that the burden of proof which the law, after proof of such facts, places upon the representatives of the husband to show perfect good faith, has not been met by the administrator. There is considerable proof in the case, and some of it of great force, brought out by the petitioner, tending to show, both before and after the intestate's death, knowledge on the part of Mrs. Jones of the contents of this paper, as well as acquiescence by her in its provisions; and this class of evidence, however, while

it is entitled to great weight in affecting the probabilities of the matter, at most, as it seems to me, tends to show that she thought she was bound by the agreement, and does not bear upon the vital question in this case—viz., what took place at the time of the execution of this instrument?—with the same degree of force as do the admissions of the intestate as to the very transaction itself. The agreement in question must be held to be null and void. A decree may be entered upon five days' notice judicially settling the accounts of the administrator as filed, except the item of \$2,000 above referred to, included in the disbursements, which is disallowed, and also allowing, after making proper deductions for cash already paid her, \$150 in cash and any household articles (or their value) which ought to have been set off to her as widow as her exemption, and distributing the surplus of the estate among the widow and next of kin, as provided by the statute. All questions of costs and allowances for counsel in this proceeding are reserved until the entry of the decree.

In re THOMAS' ESTATE.

(Surrogate's Court, Cattaraugus County, Filed April, 1893.)

1. TRANSFER TAX—ADOPTED CHILDREN.

When an assessment was not made on legacies to legatees who stood in the relation of adopted children to testatrix for more than ten years prior to her death, and which would have been liable to duty under the original act of 1885, ch. 483, the tax having accrued prior to the amendment of ch. 713 of 1887, exempting such legacies from taxation—*held*, that under section 25 of the act as amended by Laws 1889, ch. 479, the legatees were entitled to the benefit of the amendment of 1887, and this right was not affected by Laws of 1892, ch. 309, sec. 23, repealing the act of 1889, as the saving clause of the act of 1892 preserved prior rights.

2. SAME—EXEMPT PROPERTY.

Money, being part of the distributive share of decedent in the estate of a deceased sister who resided at her death in another State, and no

part of which had come into decedent's possession prior to her death but had been remitted directly by the trustee of the sister's estate to the executor of decedent, for distribution, is not liable to taxation.

3. SAME—FOREIGN CORPORATIONS.

Stocks of foreign corporations, the dividends accruing upon which are made payable at, and which can only be transferred at, the home office of such corporations, are not property within the State, liable to taxation under the act of 1885 and amending acts, although the certificates were owned by, and in the possession of, decedent in this State.

Proceeding to determine the tax to which the estate was liable under the act of 1885, c. 483, upon the report of an appraiser, appointed on the surrogate's own motion, to determine the value of the estate.

A. & G. E. Spring, for executors and legatees.

DAVIE, S.—Testatrix died at the town of Hinsdale, Cattaraugus County, on the 18th day of February, 1887. Her last will and testament was admitted to probate on the 14th day of March following, and letters thereupon issued to the executor therein named. Testatrix devised her real estate and bequeathed \$1,000 in money to Ellen P. Thompson, and the balance of her estate to Helen U. Hicks. No proceedings having been instituted by the executor for the purpose of determining the amount of tax to which said estate was apparently liable under the provisions of chapter 483, Laws 1885, an appraiser was appointed upon the surrogate's own motion, for the purpose of determining the value of said estate, pursuant to the requirement of section 13 of said act. From the report of such appraisal, filed on the 10th day of April, 1893, it appears that the fair market value of the real estate of which testatrix died seized was \$1,000, and of the personal estate, \$6,550. Upon the proceedings before the surrogate to determine the tax, upon such report, the executor and legatees appear and claim exemption from taxation upon the alleged grounds—First, that testatrix sustained the mutually-acknowledged relation of parent to the legatees for more than ten years next preceding her death;

and, second, that the entire personal estate of testatrix came into this State after her death, simply for the purpose of distribution.

From the evidence taken in this proceeding, it appears that these legatees were not related to the testatrix, nor had they been legally adopted by her, in conformity with the laws of this State; but for more than ten years prior to her death the mutually acknowledged relation of parent and child had existed between testatrix and the legatees. They each began residing with testatrix in early infancy, having no home of their own, and no means of support, and were maintained and educated by the testatrix, assumed her name, called her "mother," and she exercised the same parental care over, and manifested the same affection for, each of them, as if they had in fact been her own children. Under the provisions of chapter 483, Laws 1885, such relationship, however long continued, was of no consequence. Legacies to adopted children, or those standing in that relation, of real or personal property, of the value of \$500 or over, were made liable to taxation. By chapter 713, Laws 1887, adopted children, and persons to whom the testator had sustained the relation of parent for ten years, were exempted from such taxation; but it did not in express terms, or legal effect, grant exemption from the operation of the act of 1885, in the limited number of cases in which the tax had accrued under the original act, and was uncollected at the time of the passage of the amendment. *In re Cayuga Co.*, 46 Hun, 659; *id.*, 111 N. Y. 343, 18 N. E. Rep. 866; *In re Kemeys*, 56 Hun, 118, 9 N. Y. Supp. 182. Section 25 of this amendatory act is as follows: "All acts or parts of acts inconsistent with this act are hereby repealed." And this section was amended by chapter 479, Laws 1889, so as to read as follows: "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but this act shall apply to all estates of deceased persons where no assessment of tax has been made, to which such estate or estates are liable, under the provisions of the foregoing act."

The assessment not having been made in this case at the time of the passage of the act of 1889, the exemption to adopted children provided by chapter 713, Laws 1887, became operative in this case; and these two legatees, in consequence, stood in the same situation as if the clause exempting them had been contained in the original act. By chapter 399, Laws 1892, the laws relating to taxable transfers of property were still further modified, and section 23 of the act of 1892 provides as follows: "Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed." In the column of said schedule is all of chapter 479, Laws 1889, but the "saving clause" in the act of 1892 provides as follows: "The repeal of a law, or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired * * * prior to May 1, 1892, but the same may be asserted, enforced * * * as fully and to the same extent as if such law had not been repealed."

The legatees in this case having acquired a right under the provisions of chapter 479, Laws 1889—that is, the privilege of exemption from taxation under the provisions of the act of 1885—such right was not divested by the adoption of the act of 1892, the "saving clause" of such act preventing that result. Hence it must be held, in this case, that the estate of testatrix is not subject to taxation.

The conclusions thus reached are not to any extent in conflict with the rule established in *Re Kemeys*, above cited. In that case, where a tax had become payable under the act of 1885, upon a gift by testatrix to an adopted child, there had not only been an assessment, but an order made by the surrogate, fixing and determining such tax, on the 27th day of May, 1887; and it was accordingly held that the right of the State to collect this tax was not taken away by chapter 479, Laws 1889, which went into effect June 14, 1889. But this case distinctly recognizes the intention and design of the Legislature by the enactment of chapter 479, Laws 1889, to create an exemption in

those cases where no assessment had been made prior to the act of 1887.

It further appeared from the evidence that the personal estate of said deceased consisted exclusively of her distributive share in the estate of a deceased sister, who resided at the time of her death in the city of Cleveland and State of Ohio; that no part of said estate had come into the possession of the testatrix prior to her death, aside from the certificates of stock hereinafter mentioned, but the same consisted of money remitted directly from the trustee of the estate of said deceased sister to the executor herein, for the purposes of distribution. That portion of the personal estate is not liable to taxation. *In re Swift* (Sup.), 19 N. Y. 292.

At the time of the death of the testatrix, she was the owner of, and had in her possession, certificates for 10 shares of the capital stock of the Cleveland & Pittsburgh Railroad Company, of the value of \$500; also certificates for 40 shares of the capital stock of the People's Gaslight Company of the city of Cleveland, of the value of \$1,000. Both of these companies were foreign corporations organized under the laws of Ohio and Pennsylvania. Testatrix had derived title to such stock from the estate of said deceased sister. The dividends accruing upon such stock were made payable at the home office of such corporations, in the city of Cleveland, and by the terms of said certificates they could be transferred only upon presentation at such office. The executor, after qualifying as such, sent these certificates to Cleveland, where they were negotiated at their face value, and the money derived therefrom remitted to the executor. It has been held that stock of corporations created under the laws of other States, owned by residents of this State, are not assessable for the purpose of general taxation. *People v. Commissioners of Taxes*, 4 Hun, 595. The court, in the opinion in that case, says: "Such corporations are taxable, and we must presume, in the absence of proof, that taxes in their respective home States are duly assessed and collected upon their capital stock or property. The stock in such corporations, held by individu-

als here, are simply representatives of capital or property employed in business in other States, the title to which is vested in, and controlled by, the artificial person created by, and residing in, such State; they represent an interest which is or may become a membership in the corporation, and evidence to participate in divided profits, and in the ultimate dividend of surplus after the payment of debts and obligations of the corporation. The stock certificates are not themselves the property, but evidences of the rights just mentioned, to be possessed, enjoyed and enforced under and in conformity with the laws of the State which created the body corporate. The property of the corporation, whether real or personal, in which these certificates of legal or equitable rights are outstanding, is not within the State, which by the general statute is the test of taxability."

While a succession tax is not a tax on the property, but upon the privilege of succeeding to the inheritance (Cooley, Tax'n [2nd Ed.], 30), I am of the opinion that the reasons suggested in the opinion cited are cogent in leading to the conclusion that such certificates of stock are not property within this State, subject to taxation under the provisions of chapter 483, Laws 1885, or acts amending the same.

In re BEACH'S ESTATE.

(Surrogate's Court, Cattaraugus County, Filed April, 1893.)

1. SURROGATES' COURTS—OPENING DECREE.

An alleged erroneous construction of a will is not a "sufficient cause" for a rehearing and to open a decree within the meaning of Code Civ. Pro. sec. 2481, subd. 6, providing that a decree may be opened for fraud, newly discovered evidence, clerical error, or "other sufficient cause," as the latter words mean causes of like nature with those specifically named.

2. EXECUTORS AND ADMINISTRATORS—OPENING DECREE—NEWLY DISCOVERED EVIDENCE.

A decree will be reopened for the purpose of determining the question of the executor's liability to the estate for a deduction obtained

on the payment of a note due by deceased, the benefit of which deduction was not given to the estate and information of which did not come to the applicant's knowledge till after the former trial.

3. SAME—CLERICAL ERROR.

When it is alleged that under the decision of the court on the former hearing the widow was entitled to interest on the personalty from the testator's death, and that the decree deprived her of such interest between the testator's death and the date of the decree, the latter will be opened for the purpose of correcting such error, if it exists.

Application by widow to open decree. (See p. 246 of this volume for former report.)

W. G. Laidlaw, for applicant; A. & G. E. Spring, for executor.

DAVIE, S.—The accounts of the executor were judicially settled by a decree made on the 21st day of September, 1892. In order to determine the proper disposition to be made of the personal property belonging to the estate, a construction of the will became necessary; and the question presented was whether, under the terms of the will, the widow took the personal property absolutely, or only a life estate therein. The widow was represented by counsel upon the proceedings for such judicial settlement. The question of construction was distinctly raised, discussed, submitted, and decided by the surrogate, it being then held that the widow was only entitled to the use of such property during life. The determination of such question depended largely upon the particular phraseology of the will itself. There was no conflict of evidence relating to any of the extraneous circumstances to which resort was had in ascertaining the intention of testator. The question involved was one of law, and the ground alleged in the moving papers for asking such rehearing is that the decision of the surrogate upon this proposition was erroneous, as matter of law. Assuming such to be the case, does the power exist to grant the relief sought? The Code provides that the surrogate may open, vacate, modify, or set aside an order or decree of his court, or grant a new trial or

new hearing, for fraud, newly-discovered evidence, clerical error or other sufficient cause; such power, however, to be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same power (Code, sec. 2481, subd. 6); and the suggestion of the counsel for the widow is that the alleged erroneous determination of the question of construction constitutes a "sufficient cause," within the meaning of the subdivision above cited, but such suggestion is not sustained by the decisions defining the powers of surrogates under that subdivision. It is held that such powers are limited to cases where "fraud, newly-discovered evidence, clerical error," or other sufficient causes of a like nature exist. *In re Hawley*, 100 N. Y. 206, 3 N. E. Rep. 68. "Other sufficient cause" means causes of like nature with those specifically named. *In re Tilden*, 98 N. Y. 434. The subdivision cited does not permit a resort to this method of review where the only error complained of is one of law. *In re Dey Ermand*, 24 Hun, 1; *In re O'Neil*, 46 Hun, 500; *In re Hawley*, 100 N. Y. 206, 3 N. E. Rep. 68; *Trust Co. v. Hill*, 4 Dem. Sur. 250. In view of these decisions I am of the opinion that no authority exists for permitting a reargument or rehearing upon the question of construction, and that the motion should, to that extent, be denied.

The principal affidavit upon which this application is based is not made by the widow, but by her attorney, and consequently the allegations therein contained are, necessarily, largely upon information and belief; but no objection is made to the form of the moving papers, and this motion has been argued and submitted upon the understanding that the papers were in all respects regular. In the account filed and judicially settled, the executor credits himself, and charges the estate, with the full amount of a certain note paid by him, which note was signed by the deceased and the executor himself; and such proof was adduced upon the trial as to lead to the conclusion that such note was, in fact, primarily the individual indebtedness of the deceased. It is alleged in the moving papers that the said executor did not in fact pay the full amount of such note, but pro-

cured a settlement of the same at a considerable discount, without giving the estate the benefit of such deduction, and that such information has come to the knowledge of the widow since the former trial. If these statements are true, and the executor has in fact secured a substantial deduction upon this indebtedness, and himself retained the benefit thereof, he is certainly guilty of decidedly improper and reprehensible conduct, which should not be sanctioned or sustained. The newly discovered evidence claimed to exist is the declarations of the executor to the effect that such deduction from the amount of said note had been obtained by him, and the papers presented are sufficient to warrant the opening of the decree to the extent and for the purpose of ascertaining the truth relating to such charge.

Again, it is alleged on part of the widow that a clerical error was committed in the drafting of the decree, and that the decree, as drawn, is not, in consequence, in conformity with the decision made upon the question of construction. The claim made is that, under such construction, the widow is entitled to entire avails of, and accruing interest upon, the personal estate from the death of the testator, and that by the decree entered she is deprived of all or of a part of such interest and avails accruing between the death of testator and the date of the decree. If such error exists, that, too, should be corrected, and the decree opened for that purpose.

An order should be entered, opening said decree, and granting a rehearing in this matter, for the purpose of determining the question of the executor's liability to the estate for the deduction obtained on said note, and for the further purpose of correcting such clerical error as may exist in the form of the decree.

In re VAN WERT'S ESTATE.

(Surrogate's Court, Westchester County, Filed May, 1893.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING.

A surviving administrator is not liable to account for the assets of the estate when nearly the entire thereof fell into the hands of his co-administrator, deceased, whether they were originally taken by the latter, or handed to him by the surviving administrator.

2. SAME—ACCOUNTING—STATUTE OF LIMITATIONS.

The statute of limitations may be invoked as a protection by an accounting administrator, notwithstanding that he has voluntarily accounted.

3. SAME.

Interest received on securities other than such as was accruing at intestate's death, is not a portion of the assets so as to affect the running of the statute of limitations.

4. SAME.

In such case payments by the administrator to his co-administrator, who was also next of kin, within the statutory period will not take the case out of the statute.

5. SAME.

On accounting, a surviving administrator is not obliged to produce vouchers for moneys handed to his co-administrator, as such, as they are not payments, and vouchers are only required for payments made of debts or shares or other liabilities.

6. SAME—ATTORNEY ACTING AS ADMINISTRATOR.

An administrator who is an attorney will not be allowed his costs and charges in actions in which he was concerned as attorney.

Accounting of Thornton M. Niven as surviving administrator of John A. Van Wert, deceased.

Thornton M. Niven, administrator, in person (Walter Edwards, of counsel); John T. Anderson, for Contestants (L. T. Yale, of counsel).

COFFIN, S.—It is an undisputed fact that the deceased admin-

istrator received moneys and property of the intestate amounting to at least \$25,000, which was nearly the amount of the original estate. Neither this administrator, as survivor, nor any person interested in the estate, has called upon the administrators of the deceased administrator to account, nor have those administrators voluntarily rendered any account, as provided by section 2606 of the Code. How, then, can it be expected that Mr. Niven should account and be held liable for the whole assets when the greater part fell into the hands of his coadministrator, whether originally taken by him, or handed over to him by Niven? *Non constat* but that they, or the greater part of them, remained in his hands at the time of his death. If an accounting had taken place under the above section of the Code, the fact would, perhaps, have been ascertained whether he had misapplied or wasted them, and whether Niven, by handing them to him, or permitting him to take them, was chargeable with a *devastavit*. It seems, under the circumstances, that this accounting must fail of producing satisfactory and conclusive results. It is true, however, that, under the provisions of section 2729, one of two or more administrators may present a petition for the judicial settlement of his separate account, and pray that his co-administrator may be cited to attend. That is not this case, but the administrators of the deceased administrator have been cited. The duties of the deceased administrator were paramount to his interests as next of kin, and his administrators in this proceeding stand precisely in his place. They can no more question any act of his than he could, if he were alive and a party to this matter. He certainly could not be allowed to charge his co-administrator with a *devastavit* in handing over the moneys of the estate to him, or of taking title to himself of lands sold under the foreclosure of a mortgage belonging to the estate, or of taking assignments of such mortgages to himself. If he were guilty of a *devastavit*, his administrators are in no position to allege it in this proceeding. The administrators seem to have acted in entire harmony in mismanaging the affairs of the estate, and each one appears to have had a

knowledge of what the other one did, and no complaint was ever made. Their duty was a plain statutory one, and they should have closed up the matter many years since; but, instead of doing so, they appear to have managed it as though it all belonged to the two next of kin, as it did, without regard to the fact that they must die, when others might step in and criticise their acts. The only safe guides for executors and administrators are the statutes on the subject. A failure to observe them almost inevitably leads to trouble. Here they invested and re-invested moneys, and did many other things that were entirely foreign to their duties, but of which these contesting administrators have no right to complain; and hence their objections must fall.

The statute of limitations is invoked as a protection by the accounting party, and it would seem that it is a shield of which he may rightfully avail himself here. Administration was granted in October, 1877. One year from that time the distributive shares became due. The administrator next of kin died in December, 1889. The next year this voluntary proceeding was commenced, and the next year, before its conclusion, Julia Van Wert, the only other next of kin, died. About twelve years, therefore, elapsed before any settlement of the estate was sought or commenced, within which it could have been done. It was held in the case of *House v. Agate*, 3 Redf. Sur. 307, affirmed by the General Term on appeal, that in such case the statute was a bar. It was also held in that case that the fact that the executor applied for a voluntary accounting did not deprive him of the right to set up the statute. The same doctrine was held in *Re Clayton* (Surr.), 5 N. Y. Supp. 266. All of the assets of this estate fell at once into the hands of the administrators, and it does not appear that any have since been received. The interest they subsequently received on securities other than such as were accruing at the intestate's death was not a portion of the assets received by them. It may be said that payments were made by the accounting party to "W. A. Van Wert, co-administrator and next of kin," as he states in

his account, which operate to take the case out of the statute. A payment, usually, to revive a claim barred, is upon some previous fixed sum, but here there was and could be nothing of the kind. I am inclined to think that, if there were such payment, it would not operate to take the case out of the effect of the statute. However that may be, as above remarked, the duties of the deceased administrator were paramount to his rights as next of kin, and he must be deemed to have received such moneys in his official capacity, to be duly administered by him. As to Julia Van Wert, it does not appear that the accounting party ever paid to her anything on account as next of kin or otherwise since 1878. It was claimed, however, by him that his co-administrator acted as agent for Julia, and that he handed him money for her, while this is denied by the contestants. In my view of the matter, it is unnecessary to decide the controversy. The statute bars her claim.

It seems to me that on both the above grounds the contestants have established no liability to them on the part of Mr. Niven. If this be so, then the question as to his having or not filed proper vouchers is of no concern to the contestants. And, again, if it be correctly held that the moneys paid for or handed to the deceased administrator came into his hands in his official capacity only, then they were not payments, and vouchers are only required for payments made of debts or shares or other liabilities. There should be disallowed to Mr. Niven, however, his costs and charges in actions in which he was concerned as attorney. I so held in the case of *Campbell v. Purdy*, 5 Redf. Sur. 434. A decree will be prepared according to the views above expressed, with costs to the surviving administrator.

In re KLETT'S WILL.

(Surrogate's Court, Westchester County, Filed April, 1893.)

1. WILL—REQUEST TO SIGN.

On an application for the probate of a certified copy of a will and codicil of a decedent who died resident in Pennsylvania, in which State the will and codicil had been proved, it appeared that the attestation clause to the will did not state the witnesses signed at the request of the testator, and that the laws of Pennsylvania did not require proof of such request, which was essential under the statute of this State. The surviving witness, however, testified that the testator presented the will to him with his name already signed to it, and requested him to be a witness thereto, and that he signed it accordingly, but he could not recollect whether the other witnesses were present. The handwriting of the testator and of the other subscribing witnesses were proved. *Held*, that the will was sufficiently established.

2. WILL—ACKNOWLEDGMENT BY TESTATOR.

When a testator presents a paper to a witness with his name already signed to it, and declares it to be his will, it is tantamount to an acknowledgment of his signature.

3. SAME—SIGNATURE BY WITNESSES.

The New York statute does not require that the witnesses should sign in the presence of each other.

4. SAME—PROOF OF EXECUTION.

In such case the only surviving witness (a lawyer) to the codicil could not swear positively that he saw the deceased sign it, or that the deceased declared the paper to be a codicil to his will, but he testified he prepared the codicil at decedent's bedside and at his dictation, and that he believed the attestation clause, which stated that he "published" the paper as such, to be true. He also testified that the other witnesses either signed at the request of the deceased, or at his (the lawyer's) request with testator's consent. The handwriting of testator and of the deceased witness was proved by another witness. *Held*, that the requirements of the statute were complied with.

5. SAME.

When a codicil says, "I, Frederick Klett, the within named testator," and correctly refers to the date of the will, thus allowing the inference to be drawn that it was endorsed upon or appended to the will—*held*, that the proving of the codicil proves the will.

Probate of certified copy of a will and codicil purporting to be made by Frederick Klett, deceased, a resident of Pennsylvania, in which State the papers had been proved and admitted to probate on August 3rd, 1859.

W. S. Allerton, for Franklin C. Jones, surviving executor; Stapler, Smith & Thompson, for F. K. Beckley and others.

COFFIN, S.—Judging from the language of the attestation clauses of the will and codicil, and the proofs taken on the probate by the register of wills, the laws of the State of Pennsylvania do not require that the witnesses should sign at the request of the testator, while the law of this State does. In order that the will may be admitted to probate here, it must be proven to have been executed according to the laws of this State. The attestation clauses to the will and codicil are similar, and state that they were “signed, sealed, published and declared” by the testator, “as and for his last will and testament, in the presence of us, who have hereto subscribed our names in the presence of the testator and of each other.” They do not state that they were requested by him to so sign, and the proofs follow the attestation clause. Our law, as stated, requires this request, in some form, to be made. It need not, however, be so stated in the attestation clause. That is no part of the will, and a will may be proven where there is no such clause, provided the witnesses can testify to facts showing a compliance with the requirements of the statute. In this case only one of three witnesses whose names are signed to the will is alive, and only one of three to the codicil; hence, if the will is susceptible of proof at all, it must be by the testimony of the living witness, and by proving the handwriting of the testator and of the subscribing witnesses, under section 2620 of the Code, and so of the codicil. Pleis, the living witness to the will, testifies that the testator presented the will to him, with his name already signed to it, and requested him to be a witness to his will, and that he signed it accordingly. This is all our statute requires, in so far as he

was concerned; it having been repeatedly held that where the testator presents a paper with his name already signed to it, and declares it to be his will, it is tantamount to an acknowledgment of his signature. He could not, after the lapse of more than 30 years, recollect whether the other witnesses were present; nor was it necessary that he should. The statute does not require that the witnesses should sign in the presence of each other. The handwriting of the testator and of the other subscribing witnesses to the will having been proved, as provided by the section referred to, the will appears to be sufficiently established, and is therefore admitted to probate.

The only surviving witness to the codicil is Richard J. Williams, a lawyer, who drew the codicil to the will, and was present at its execution. He does not swear positively that he saw the deceased sign it, but believes that the attestation clause, commencing, "Signed, sealed," etc., states correctly what occurred, and says he signed as a witness at the request of the deceased, and that the other two witnesses either signed at the request of the deceased or at his (Williams') request, with his consent. The handwriting of Frederick Klett and of the deceased witnesses was sufficiently proven by another witness. Now, while Mr. Williams does not directly testify that the deceased declared the paper to be a codicil to his will, yet he does say that he prepared the codicil at his bedside, and at his dictation, and that he believes the attestation clause, which states that he "published" the paper as such, to be true. There can be no reasonable doubt, from these facts, that the deceased fully knew and understood the character of the paper which he was executing; and this fulfills the requirements of the statute in this respect. From the language of the codicil it is fair to infer that it was indorsed upon or appended to the will, for it says, "I, Frederick Klett, the within-named testator," and refers correctly to the date of the will. I have heretofore held in *Storm's Will*, 3 Redf. Sur. 327, that the proving of the codicil, under similar circumstances, proves the will. Both are therefore admitted to probate.

In re BARKER.

(*Surrogate's Court, New York County, Filed June, 1893.*)

GUARDIAN AND WARD—STATUTE OF LIMITATIONS.

Where it clearly appeared from the evidence that the ward, both before and after her majority, had a knowledge of the state of her guardian's accounts sufficient to show her that the entire trust fund had been expended, and she did not begin the proceeding till ten years after attaining her majority, the statute of limitations applies. *Quacres*, whether even without such evidence the rule that as between trustee and *cestui que trust* no statute of limitations, nor any bar by analogy to the statute, can be operative, is applicable.

Accounting by guardian. Report of referee overruled on exceptions and proceedings dismissed.

Charles F. Wells, for guardian; Large & Stallknecht, for ward.

RANSOM, S.—This is an accounting by the general guardian of the infant above named, originally compulsory, but converted into a voluntary proceeding. Exceptions are filed by accountant and contestant. On the 8th of July, 1869, Mrs. Place, the mother of the infant, was appointed general guardian. The ward filed a petition for a compulsory accounting March 9, 1891, 22 years after the appointment, and within six days of ten years after the ward had attained her majority. Prior to the taking of any testimony in this proceeding as to the accountability of said guardian for moneys received and paid out by her as such, counsel for the guardian interposed as a defense the statute of limitations, both to the said petition of the said contestant, and to the objections to said account of said guardian, as filed. The decision of the referee, overruling the objection of the statute of limitations, is based upon *In re Camp*, 126 N. Y. 389, 27 N. E. Rep. 799, which appears to hold that, although a party may cease to be guardian, upon the ward coming of age, yet so long as the property remains in his possession

as guardian, and unaccounted for, he remains liable to account. The leading case in this State upon the rule that, as between the trustee and the *cestui que trust*, no statute of limitations, nor any bar by analogy to the statute, can be relied on, is *Kane v. Bloodgood*, 7 Johns. Ch. 89. The case of *Lockey v. Lockey*, Prec. Ch. 518, referred to on page 113, 7 Johns. Ch., clearly recognizes the rule that, where there is a legal and equitable remedy in respect to the same subject-matter, the latter is under the control of the same statute bar with the former. In *Buswell on Limitations* (page 193), it is stated that the ancient action of account was the remedy provided in cases where there was a privity between the parties, as against a bailiff or receiver, or a privity in law as against a guardian *in socage*. Further on it is also stated that the period of limitation to an account is, either by construction or statute provision, made the same in equity as at law. In an early case the lord chancellor was of opinion that "where one receives the profits of an infant's estate, and, six years after his coming of age, he brings a bill for an account, the statute of limitations was a bar to such a suit, as it would be to an action of account at law," and cited *Lockey v. Lockey*, Prec. Ch. 518. The administration of trusts falling within the peculiar and exclusive jurisdiction of courts of equity, the doctrine is established that as between trustee and *cestui que trust*, so long as that relation subsists, the trust cannot be affected by the statute of limitations; but where the relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, courts of equity will refuse the relief, upon the ground of lapse of time, and inability to do complete justice between the parties. The equitable principle upon which the general doctrine is founded is thus stated by Lord Redesdale: "If a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and, if the only circumstance is that he

does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." *Hovenden v. Annesley*, 2 Schoales & L. 633; *Busw. Lim. & Adv. Poss.* 457.

There is authority for the statement that upon the ward's arriving at his majority, or at least upon his settlement with the guardian, the limitation begins to run, as between guardian and ward. *Mason v. Johnson*, 13 S. C. 20; *Jones v. Jones*, 91 Ind. 378. After a ward becomes of age, the fiduciary relation of guardian and ward ceases, and the parties are in relation of debtor and creditor, and the claim of the ward is within the statute. *Busw. Lim. & Adv. Poss.* 474, and cases cited. The distinction runs through all the cases that the mere retention of the funds furnishes no grounds to assume the title thereto in the trustee, inasmuch as such retention is consistent with the character he sustains, and therefore does not excite any suspicion of an intention to appropriate the funds. Although the statute of limitations does not apply directly to technical trusts, yet it has always been held that if a trustee should deny the right of the *cestui que trust*, and assume absolute ownership of the trust property, he thereby abandons his fiduciary character, and the *cestui que trust* must commence legal proceedings against him within the statutory period of limitations. It should appear that the *cestui que trust* had knowledge of the trustee's denial, repudiation, or adverse claim, and that the trustee has not been guilty of fraud. The doctrine that a positive and technical trust is not barred by the lapse of time is subject to two qualifications, namely, that no circumstances exist to raise the presumption from lapse of time of an extinguishment of the trust, and that no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title. *Busw. Lim. & Adv. Poss.* 471. Lapse of time, without any claim or admission of an existing right, coupled with circumstances tending to show that a trust had been executed, may raise a presumption of its execution, and, in case of a guardian,

may authorize the court to require a less specific statement of items, and raise a presumption of payment to and for the ward to the amount of the account. *Gregg v. Gregg*, 15 N. H. 190; *Whedbee v. Whedbee*, 5 Jones, Eq. 392. In *Re Neilley*, 95 N. Y. 382, it was held that it is only where there is an actual, continuing and subsisting trust that a trustee is precluded from setting up the statute of limitations. This was held upon the authority of *Kane v. Bloodgood*, 7 Johns. Ch. 89. The opinion of the court in this case, at page 90, refers to the equitable rule under which courts of equity reject stale claims, independent of the statute of limitations, and cites one case where a bill was filed against an executor for an account, and there being no statutory protection, and the presumption of a final settlement being rebutted, the court refused to open the account after a great lapse of time, when it was probable that most of the parties were dead, and the vouchers and the receipts were lost. In the case at bar, ten years had elapsed after a practical, informal settlement out of court, and many of the items for which reimbursement was claimed were rejected because of the absence of vouchers or substituted proof required by section 2734, Code Civil Pro. In *Re Hawley*, 104 N. Y. 261, 10 N. E. Rep. 352, it was held that, to constitute a testamentary trustee, it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is, in a general sense, a trustee, for he deals with the property of others, confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity and in the statutes. In *re Camp*, 126 N. Y. 377, 27 N. E. Rep. 799, was a proceeding against the father and guardian of petitioner to compel him to account. The mother of the ward died seized of certain real estate, leaving her husband and four children, heirs-at-law. Prior to her death the city had commenced proceedings to acquire title to a portion of the real estate, which after her death resulted in an award of \$26,000 to the petitioner, and his brother and sisters. This sum was paid to the father, as such guardian. The ac

counting proceeding was commenced in May, 1888. The moneys were received in February, 1868. The fact of the receipt of the moneys first became known to the petitioner within a year of the institution of the proceedings. The respondent answered that the guardianship of the petitioner ceased in 1872, when he became of age, and that the present proceedings were on that account barred by the statute of limitations. The surrogate overruled the objection, and directed the guardian to file an account. After an unsuccessful appeal to the General Term, the guardian filed his account, which was of a most general character, and from which, and from his statements accompanying the same, it appeared that he had made certain payments which he claimed to charge the petitioner with, and which, if allowed, would show that he had more than paid out for the benefit of the ward the moneys that he had received. Objections were filed to the account, and it was sent to a referee. Before the referee the guardian insisted that the fund was not such a fund as he should account for as general guardian, nor could any portion of it be enforced to be distributed among the heirs at that time, or at any time prior to his decease. This objection was also overruled, and the guardian excepted. The referee found the guardian liable to account for the amount he had received, but that he was to be credited with the value of his life interest therein. He deducted the proportionate share of such life interest from the share of the petitioner, and gave judgment for the balance, with interest. The General Term modified this so as to charge the guardian with the full sum received by him, with interest from the time he received it. At the foot of page 388, 126 N. Y., and page 803, 27 N. E. Rep., of the opinion, the court refer to their previous decision in *Re Hawley*, 104 N. Y. 261, 10 N. E. Rep. 352, and distinguish it. But at page 389, 126 N. Y., and page 803, 27 N. E. Rep., they state that they do not regard the matter as very important upon this question. While I am not by any means satisfied that the decision of the Court of Appeals in *Re Camp*, 126 N. Y. 377, 27 N. E. Rep. 799, is decisive upon the point that the relation

existing between a guardian and a ward after majority is such a technical trust as to subject it to the rule that the statute of limitations does not apply, the matter may be decided upon another point, as to which the law is entirely clear. At page 12 of the minutes, the mother testified: "Ever since Cora knew anything, she saw my account book. It always lay on the table or on my desk, and it was never locked. If she did not inspect those accounts, it was because she did not want to. I supposed she did. Question. Did she look over the accounts? Answer. In a general way, certainly she did, for she could not help it. I have read them over to her, and told her about it."

These transactions occurred at or before she attained her majority. "Q. Do you say the same of your account as guardian—the history of your administration up to the time when she became of age?" A. Yes, sir." At page 78 the ward testified: "My mother always treated me very kindly, but I thought it strange that I never had anything, or any money. After I was of age, I asked my mother about it. I never asked before. Q. What did she tell you when you became of age? Did she show you the account? A. No; she only said she spent all upon living."

It appears by this testimony that subsequent to the attainment of her majority, the guardian and ward had a conversation concerning the accounts of her mother, and the mother stated that she had expended the entire fund. All the other circumstances surrounding the case negative the idea that the trustee was guilty of any fraud or concealment which would prevent the repudiation from having its legitimate effect. The accounts were always open to her inspection, and, notwithstanding her statement that she did not examine the same, it is apparent from other portions of the testimony that she knew their contents, and was aware that in some instances her mother had charged against her sums as low as 5 or 10 cents. She could not have known this without, to some extent, having examined the account. I am therefore of opinion that the referee's report must be overruled, and the proceedings dismissed, upon the ground that the statute of limitations runs against the claim.

*In re NEVINS' WILL.**(Surrogate's Court, Westchester County, Filed June, 1893.)***WILL—SUBSCRIPTION BY TESTATOR.**

One of the witnesses to a will testified he did not remember seeing testatrix sign the paper or make her mark, and another witness swore positively he did not. Their evidence did not disclose that either of them was in the room when the mark was made, but the third witness (the attorney who drew the will) testified that the whole business of the preparation, execution and witnessing of the paper was done at the same interview, including the signing by the deceased and the three witnesses. The other witnesses testified that neither of them saw the attorney sign as a witness. *Held*, that the proof was not satisfactory of the subscription by the testatrix in the presence of two witnesses, and probate should be refused.

Probate of alleged will of Jane Nevins. Denied.

F. X. Donoghue, for proponent; Arthur J. Burns, special guardian, for contestant, Anna Nevins; James H. Moran, special guardian, for Peter Nevins, son of decedent.

COFFIN, S.—This is a remarkable case in this respect: that the alleged will bears a date which was five days subsequent to the date of the death of the decedent. The proof that she died on the 4th day of August, 1891, is abundant and conclusive. While the attorney who drew the will testified that it was prepared and executed on the day of its date, the witnesses Neely and Clinch both swear that they signed the paper about a year before her death. The attorney is evidently mistaken in this. Ordinarily a mistake in the date is of little importance, but it may become so in connection with other facts. The attorney was a witness in this proceeding, and testified that two different kinds of ink were used in the written parts of the blank—one a pale, and the other a darker, ink. This is apparent from an inspection of the paper. In the blank formal part of the commencement of it there was printed: "I" (blank), "of" (blank),

"county of" (blank), "and State of" (blank), "aged" (blank), and the blanks were filled with "Jane Nevins," "Yonkers," "Westchester," "New York," "about fifty," all with the pale ink, except "New York," which was with the darker. In the disposing part, after the printed words "I give," was written with the pale ink, "and bequeath to Finton Phelan, all my property of every name and description, in trust, nevertheless, to collect the rents and profits and pay over the same to my son Peter Nevins." Then immediately follows in the darker ink, "until he shall attain the age of twenty-one years, at which time I hereby direct my said executor and trustee to convey to my said son Peter Nevins all my property of every nature and description." Then follows a blank space of 42 ruled lines, to the foot of the third page, where the witnesses signed with the same pale ink. The same ink was used in filling in the name of the executor in the blank for it, the name of the deceased in two places, and the rest of the blanks to the end, including the blanks in the attestation clause and the signatures of the witnesses, except in the blanks for the date. While the "ninth August" are in the same ink, the "ninety-one" is in the darker, and also the name of the attorney, subscribed as a witness. The attorney testified to the different inks as above stated, and attempts to account therefor by saying that he sometimes took ink with him, but does not say that he did in this instance. The paper was prepared and completed, as he states, at the house of decedent, who was ill in bed, on the single occasion. It seems scarcely credible that he should have written at the same time "Jane Nevins," "Yonkers," "Westchester," in the pale ink, then "New York" in the dark ink, and then immediately changed to the pale ink in writing "about fifty;" and the same remark will apply to the dating of the will, "ninth" and "August" being in the pale ink, and "ninety-one" immediately changed to the dark. Both the other subscribing witnesses swear that they did not see the lawyer sign his name, which was written with the dark ink, as a witness. Now, this lawyer had no interest in the matter, so far as appears, other than profes-

sionally, and no motive can be readily assigned prompting him to do anything unprofessional. He took this alleged will with him, and it remained in his hands more than two years—from the time of its alleged execution until about January, 1893. It was then called for by ex-Judge Thayer, but the lawyer refused to deliver it to him, except upon the order of the executor or Peter Nevins, the alleged beneficiary. Subsequently Judge Thayer presented an order from the latter, and the paper was delivered to him. The evidence and circumstances seem to indicate that in the interval, having examined the paper and discovered the blanks unfilled, now in the dark ink, the failure to make a final disposition of the estate in the disposing part of it, according to the previously expressed wish of decedent, he added what is there written, then supplied the year from a lapsed memory, and then subscribed his name as a witness, he having been present throughout. Other reputable lawyers have been known to slightly change or correct a mistake in an executed paper left in their possession, in order that it might conform to and express the true facts, however reprehensible the practice. He states that the dark ink was such as he used in his office. Now, while a mere subsequent writing in of the date alone is of little importance (and a mistake in dating a year ahead has never been known to me, while giving the date of the past year frequently occurs), yet the fact of inserting the clause in the disposing part either renders the alleged will wholly void or void *pro tanto*. I have frequently had occasion to animadvert upon the use of blank forms, and of leaving blank spaces in wills, and especially where they are left in the custody of the draughtsman. *McCord v. Lounsbury*, 5 Dem. Sur. 68, citing the case of *Heady's Will*, 15 Abb. Pr. (N. S.) 211. The blanks may be filled with dispositions of property not intended by the testator. For instance, in this instance there could readily have been added a provision to the effect that if Peter Nevins should die before his arrival at the age of 21 years, the estate should be equally divided among the other children, or any other provisions which might occur to the draughtsman, until the blank

space was entirely filled. Whether the instrument was so tampered with as indicated it is unnecessary to determine, as it must be rejected as a will upon another ground.

The subscription and publication of a testamentary instrument are independent facts, each of which is essential to a complete execution. The two prerequisites are distinct in their nature, as well as their purpose, and an omission to comply with either is fatal to its validity. There must be satisfactory proof of the subscription and publication of the will in the presence of two witnesses. *Baskin v. Baskin*, 36 N. Y. 416. The case of *Chaffee v. Society*, 10 Paige, 85, where the testatrix, who had subscribed her will by making her mark, but not in the presence of the attesting witnesses, and afterwards, and in their presence, placed her finger on her name, and said, "I acknowledge this to be my last will and testament," and it was held that the will was not duly executed, was approved in *Lewis v. Lewis*, 11 N. Y. 220. Now, in this case, the witness Neely testifies that he does not remember seeing Mrs. Nevins sign the paper or make her mark, while Clinch swears positively that he did not. It does not appear that either of them was in the room when the mark was made, except that the attorney testifies that the whole business of the preparation, execution, and witnessing of the paper was done at the same interview, including the signing by the deceased and the three witnesses, but this evidently refers to the interview between him and the deceased. Clearly the witnesses Neely and Clinch were not present when the paper was prepared, and that was done during the "interview." Neither of them saw the paper in her hands, nor saw her make her mark or touch the paper; nor does it appear that the attestation clause was read to or by them. Mr. Clinch says Neely had signed his name before he entered the room, and he was there a half a name before he entered the room, and he was there a half a minute—just long enough to sign his name. Deceased said nothing to him. There was no publication made to him. He only supposed it was a will because the messenger sent to him told him what he was wanted for; but the attorney told him to

sign. He did so, and went out immediately, and neither he nor Neely saw the attorney sign as a witness, and yet the latter testifies that they all signed in the presence of the deceased and of each other, and that she declared it to be her last will and testament in the presence of the three witnesses, and requested them to sign. He seems to testify to what the law requires rather than to the facts as they actually occurred. Under the circumstances, it seems that little reliance can be placed upon his memory of the transaction. He is contradicted on too many vital points by the other entirely disinterested witnesses, and especially by Clinch, who is clear and positive in his statements. The proof is not satisfactory to my mind of the subscription by the deceased of the paper propounded in the presence of two witnesses, and therefore probate must be refused. It is also very doubtful as to whether there was a proper publication, but it is unnecessary to consider that question here.

It may not be improper to remark that in trying the case the learned counsel directed their attention more particularly to the fact of the two different kinds of ink used in the body of the instrument and to inferences to be drawn therefrom and the resulting effects, rather than to the question of a valid subscription and publication. Decree accordingly.

In re SCHULER'S ESTATE.

(*Surrogate's Court, Rockland County, Filed July 31, 1893.*)

1. BEQUEST TO CEMETERY CORPORATION—VALIDITY.

By section 9 of Laws of 1847, chapter 133 (general act as to rural cemeteries), it is provided that an association thereunder incorporated may take and hold property for (*inter alia*) improving the cemetery lots according to the terms of the grant, devise or bequest. *Held*, that the Oak Hill Cemetery of Nyack, whether incorporated thereunder or under the special act, Laws 1865, chapter 139, relating to Oak Hill Cemetery, Rockland County, might take and hold a legacy upon trust

to apply the income for the perpetual care of a lot therein, as section 8 of latter act conferred upon said cemetery the powers contained in the general act.

2. SAME—STATUTE AGAINST PERPETUITIES.

A bequest to a cemetery corporation upon trust to apply the income for the perpetual care of a lot does not violate the statute against perpetuities, when the act under which it is incorporated authorizes it to hold funds for such a purpose.

Application to compel payment of a legacy. Granted.

William T. B. Storms, for petitioner; Snider & Hopper, for executors.

WEIANT, S.—This is an application by the Oak Hill Cemetery of Nyack, in this county, to compel the payment to its trustees by the executors of the last will and testament of John W. Schuler, deceased, of a bequest of \$1,000, and interest thereon, pursuant to a direction of the testator contained in his said will. That provision of his will reads as follows: “I hereby authorize, empower and direct my executors to pay over to the trustees of Oak Hill Cemetery of Nyack the sum of \$1,000, to be by them invested only on first mortgage bond and mortgage on improved real estate of double the value of such sum, and the interest accruing from the same to be applied by the said trustees in keeping my lot in said cemetery grounds (number three) in good and proper condition, making such needed repairs as are required from time to time during the several seasons of the year, to both fences and grounds, as shall be demanded, and this trust to be and remain in perpetual continuance; and my executors hereinafter named are named as supervising representatives of my estate, to see that the provisions of this trust are faithfully observed during their or either of their lifetime; they, also, have authority to name their successors by testamentary appointment; the trustees of said cemetery to permit and suffer my brother-in-law John Reinhard and his wife to be buried in said lot at their decease.”

The application is made under subdivision 2, section 2717, of the Code of Civil Procedure. The citation required by section 2718 was issued and duly served upon the executors. Upon the return day of the citation, the executors appeared by their attorneys, but filed no answer. The parties, through their respective attorneys, proceeded to dispose of the matter as if the question of the validity of the foregoing provision of the testator's will was the only one to be considered and determined. I shall accordingly consider the matter and render my determination. The petition alleges that Oak Hill Cemetery is duly incorporated under the laws of the State of New York. This allegation was not controverted, and no proof was given thereof. The question was not raised on the hearing, and, when the matter was submitted, it stood as a conceded fact. It must be assumed, in the absence of specific proof, that, if said cemetery was duly incorporated under the laws of this State providing for such corporations, the same was incorporated under the general statute authorizing such corporations, and with all the rights and powers conferred by such laws. Such corporation law is found in chapter 133 of the Laws of 1847, entitled "An act authorizing the incorporation of rural cemetery associations," and the acts amendatory thereof. By section 9 of that act it is enacted as follows: "Any association incorporated pursuant to this act may take and hold any property, real or personal, bequeathed or given upon trust, to apply the income thereof under the direction of the trustees of such association, for the improvement or embellishment of such cemetery, or the erection or preservation of any buildings, structures, fences, or walks, erected or to be erected upon the lands of said cemetery association, or upon the lots or plots of any of the proprietors; or for the repair, preservation, erection, or renewal of any tomb, monument, gravestone, fence, railing, or other erection, in or around any cemetery lot or plot; or for planting and cultivating trees, shrubs, flowers, or plants, in or around any such lot or plot; or for improving or embellishing such cemetery, or any of the lots or plots in any other manner or form, consistent with

the design and purposes of the association according to the terms of such grant, devise, or bequest."

Here is a broad, comprehensive legislative enactment, as to the purpose and intention of which there can be no doubt. Its language is full and explicit, and clearly covers the purpose of the testator. Indeed, this is not denied by the executors' counsel, but he contends that this general statute does not apply to the petitioner. He claims that the petitioner was created by chapter 139 of the Laws of 1865, entitled "An act in relation to Oak Hill Cemetery, in the County of Rockland," and that the provisions of the general act above cited are not applicable to the petitioner. If it be assumed, in the absence of proof of the incorporation of the petitioner, that this latter act gave the corporate life to the petitioner, and there are provisions therein so indicating, one of which is section 2, which reads as follows: "All persons who are now owners or hereafter shall become proprietors of lots or parcels of ground within the inclosures now known as the 'Oak Hill Cemetery,' or of such additional lands as may hereafter be purchased or added thereto, shall become members of the body corporate to be known as the 'Oak Hill Cemetery of Nyack,'"—still the petitioner has the same rights and powers as corporations incorporated under the general act. By section 8 of this act it is declared that, "except as herein otherwise provided, the said Oak Hill Cemetery shall possess the general powers and privileges, and be subject to the liabilities and restrictions, contained in chapter 133 of the Laws of 1847, entitled 'An act authorizing the incorporation of rural cemetery associations.'" This provision is also so clear and specific that it is not apparent where any question can arise as to the petitioner having the powers conferred by the general act.

The executors' counsel advances still another objection to the granting of this application. He contends that the bequest is void under the statute against accumulations and perpetuities. It is by such statute provided that: "The absolute ownership of personal property shall not be suspended by any limitation or

condition whatever for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator."

This objection would be well taken were it a fact that the statute for the incorporation of rural cemeteries did not legalize and authorize the trust in question created under the testator's will. This statute against perpetuities is general, and applies to all cases, except where special provision is otherwise made. The same power that created the general prohibition can authorize an exception, and determine that the general provision shall not apply. The legislative power has prohibited generally such perpetuities, and the same power has, as to cemetery corporations, removed such restriction and bestowed affirmatively the power and right to hold funds for the purposes specified in this will, and I see no reason why both should not stand with force, the latter as a statutory exception to the general law. In the case of *Holland v. Alcock*, 108 N. Y. 312 16 N. E. Rep. 305, the power to authorize trusts by legislative acts, and that the same is exercised, appears to be fully recognized. Judge RAPALLO, in a most erudite and exhaustive opinion, reviews the law and authorities as to trusts, and says on page 336, 108 N. Y. and page 316, 16 N. E. Rep.: "And the substitution of a charity system maintained by our statute laws in the form of corporate charters, containing, by legislative enactment, power to receive, hold, and administer charitable gifts of every variety known in the practice of civilized communities and our statute of uses and trusts which may lawfully be created." Of the statute against perpetuities he says: "The statute has been held binding on our courts, although, of course, it ceases to operate when the legislature charters a corporation for a charitable purpose, with power to take and hold property in perpetuity for such purpose"—citing authorities.

The counsel cites to sustain his contention the case of *In re Fisher's Estate* (Surr.), 8 N. Y. Supp. 10. That case is dis-

tinguishable from this. The learned surrogate does not decide that a bequest to an incorporated cemetery association similar to this one is invalid. That was a bequest of a fund to an executor, to be used to keep the testatrix's burial plot in good condition, and it was held to be void, under the statute against perpetuities. Here the bequest is to the corporation, and, as we have seen, the statute specifically makes such a bequest lawful. It is perfectly clear from a reading of the surrogate's opinion that no such point was involved or considered by him as arises in this matter.

No question being raised but that there are now and have at all times been, ample funds in the hands of the executors applicable to the payment of this bequest, let an order be entered accordingly, directing the payment of the same to the trustees or proper officers of the cemetery association. The question of interest on the legacy will be determined upon entry of the order, as the provisions of the whole will are not before me. The petitioner is entitled to costs, to be paid out of the estate.

In re VAN NOSTRAND'S ESTATE.

(Surrogate's Court, Rockland County, Filed April, 1893.)

1. EXECUTORS AND ADMINISTRATORS—ATTORNEY'S FEES.

An administrator will not be allowed for moneys paid to his counsel for services requiring no legal skill, and which the administrator himself might have performed.

2. SAME—ALLOWANCE FOR CLERK.

In such case a payment (*inter alia*) to counsel for the administrator for attending at an auction sale will be disallowed as to so much thereof as might be over and above what might be allowed a clerk if it were essential that a clerk should be employed.

3. SAME—REASONABLENESS OF CHARGES.

When an attorney is paid for services requiring legal skill, and he testifies that the amount fairly compensated him, the court will, in the absence of evidence to the contrary, and when it cannot be guided by its personal knowledge, allow the charge.

Judicial settlement of account of Holland Trust Company as administrator.

Snider & Hopper, for administrator; Abram A. Demarest, for contestant.

WEIANT, S.—The only matters contested and submitted for my consideration and determination upon this accounting arise upon the item in schedule C of the accounts: "Paid Snider & Hopper, services, \$700." From the bill submitted upon the hearing, it appears that the same is for legal services, and that the same has not in fact been paid by the administrator. The rule is well settled that in no event can an allowance be made to a representative of an estate for an administration expense—as, for instance, counsel fees—until he has actually paid it. Redf. Sur. Pr. (4th Ed.) 444; *In re Bailey*, 47 Hun 477; *Shields v. Sullivan*, 3 Dem. Sur. 296. But I shall not dispose of this matter upon that ground. The only oral testimony relating to the services charged for was given by Garret Z Snider, Esq., of the law firm who rendered the same. He testified on his direct examination to the services performed somewhat in detail, but aggregated his estimate as to their value at \$700. On his cross examination he detailed the services again, and gave the valuation of the same in detail, which aggregates \$505. The first services that he rendered were at the instance of the widow of the deceased, in searching to ascertain whether or not the deceased left a will. He says that he spent some 4½ days in that respect, and that his services were fairly worth \$20 per day, making a total therefore of \$90. Assuming that the services were thus rendered, and that the same were reasonably worth the sum named, yet the same cannot be allowed this administrator. The right of an executor or administrator to employ counsel in the prosecution or defense of actions or legal proceedings affecting the estate is, of course, allowable and proper (Redf. Sur. Pr. [4th Ed.] 447), and he is entitled to be reimbursed for all such necessary and reasonable expenditures;

but, to entitle him to charge the estate for moneys paid to his counsel or attorney, the executor or administrator must show that the services rendered were necessary, and that they merited the compensation awarded; and no allowance will be made where the services performed by counsel were such as the executor or administrator himself might justly have been expected to render. *Id.* 448; *Raymond v. Dayton*, 4 Dem. Sur. 333; *St. John v. McKee*, 2 Dem. Sur. 236; *Journault v. Ferris*, *id.* 320; *Willson v. Willson*, *id.* 462; *In re Smith's Estate*, 1 Misc. Rep. 269-280, 22 N. Y. Supp. 1067; *In re Casey's Estate* (Sup.), 6 N. Y. Supp. 608. These services, performed as to this matter by counsel, were such as the administrator, through its ordinary officers or agents, could readily have performed. Searching for the will required no legal skill or knowledge. All such services the law contemplates shall be performed by the administrator or executor, and it is for such usual and ordinary services that the commissions allowed by statute are awarded. He cannot be permitted to take these commissions, and then charge the estate with the compensation which may be earned by some one whom he has employed to do his work. If an executor or administrator sees fit to employ another to transact for him the usual and ordinary duties of his trust and for which the commissions were designed as full compensation, the expense of procuring such services becomes his own debt, and cannot be charged to the estate. *In re Beach's Estate*, 1 Misc. Rep. 27-33, 22 N. Y. Supp. 1079; *Hall v. Campbell*, 1 Dem. Sur. 415.

The charge of \$10 for services in behalf of Mrs. Van Nostrand for making the effort to obtain a bond for her as administratrix is disallowed. I do not think an expenditure for such services is chargeable to the estate, as she was not appointed administratrix. *In re Collyer* (Surr.), 9 N. Y. Supp. 297. Neither do I consider that such service called for legal skill, as the same appears to have been simply an inquiry of the surety company as to whether the company would become surety for her.

The next charges are \$5 for preparing a petition for the appointment of the Holland Trust Company as administrator; \$20 for obtaining the written consent to such appointment or the waiver of their right to administration, of three of the next of kin; \$20 for the preparation and presentation of the papers to the Surrogate's Court and obtaining the decree and letters of administration; and \$10 for obtaining the appointment of appraisers. These services, requiring some special skill or knowledge as to legal questions, are properly such as the administrator is authorized to engage an attorney to perform, and charge the reasonable expense thereof to the estate. The sums testified to by Mr. Snider as fair compensation should be allowed, because the contestants offered no evidence to the contrary, and the court cannot be guided by its personal knowledge that the same are much above the usual charges. On July 29, 1891, it appears that Mr. Snider went to New York city, and, in company with the secretary of the trust company attended at the National Park Bank to obtain securities and papers of the deceased, and remove them to the office of the trust company. That is precisely what the law contemplates the administrator should have done without an attorney. No legal advice was required. The witness really so confesses, as he testifies that his only reason for so doing was because Mr. Van Sicklen, the secretary of the administrator, asked him to do so. On July 30th the usual notice to creditors to present claims was prepared, and the same delivered for publication in a newspaper by the attorneys; and on August 1st they caused notices of the making of the appraisement and inventory to be posted and served, which services, it is testified, were fairly worth \$5 for what was done as to each matter, \$10 in all. I am inclined to believe that such service was properly one that the administrator might employ an attorney to perform, and, as the value of the same is undisputed, the two items are allowed.

The attorney testifies to having performed services in attending at the making of the inventory on two different days, and for which he charges \$20 for each day; that he prepared and had

published notices of a private sale of horses of the estate, for which he says the services were worth \$5. He prepared notices for a public sale of certain of the personalty; had bills posted thereof; and performed other services in the way of preparing for the sale, for which he fixes \$10 as the value. He attended at the sale; assisted at the same, acted as clerk; made some collections; and fixes the value of his services in that matter at \$25. The testimony discloses that the sales amounted to but \$575.90, and that there was an auctioneer who was paid 10 per cent. on the sales for his services. These items amount to \$80, and are not proper credits. The administrator cannot be allowed for the services of an attorney or counsel in such matters. *In re Quin* (Surr.), 5 N. Y. Supp. 261; *Pullman v. Willets*, 4 Dem. Sur. 536, and cases above cited; *In re Collyer* (Surr.), 9 N. Y. Supp. 297. In *Re Quin* (Surr.), 5 N. Y. Supp. 261, an item of \$30, paid for services to one who rendered services in making the inventory, was disallowed. Such a charge was refused in *Re Collyer* (Surr.), 9 N. Y. Supp. 297. The learned surrogate says, at page 298: "It is difficult to see how the payment to counsel for attendance and advice on the making of it [inventory] can be regarded as a necessary expense, in view of the further fact that, at most, an inventory is a mere guide, subject to correction by either party on the accounting. The cost of the attendance of counsel at its making does not appear to have been a just or reasonable expense to be incurred in the course of the administration. Ignorance in the matter on the part of the administrator will not justify it. He must in such case pay the penalty of his ignorance out of his own pocket. He can not expect the estate to educate him."

The surrogate is supposed to appoint qualified men to perform this service, and in this case both were especially competent, as they were lawyers. It may well be that a clerk can be employed at an auction sale by an administrator, and he be repaid out of the estate for such an expenditure, but it must appear that it is essential to have a clerk, and what such service is worth.

That does not here appear, but I will permit this to be supplied, and then determine the same accordingly.

As to the charges for services in the matter of the Nyack Electric & Power Company, consisting of three items, aggregating \$40, the same are allowable only to the extent that legal services were necessary. Much of the services charged for were such that any person of ordinary business capacity could have rendered; such as the search for, and correspondence as to, the lost certificate of stock, and also the collection of the dividends. As we have seen from a uniform line of authorities, such service should have been rendered by the administrator or its agents, and the statutory commissions are the compensation therefor. It would seem, however, that the services performed in giving the notice as to the loss of the certificate, and the giving of the bond of indemnity to obtain the new certificate, were of a legal character, requiring the service of one having some special legal knowledge, and, that being so, the administrator was justified in the employment of an attorney for those purposes, and I accordingly allow a credit for the same to the amount of \$15.

Following the above matter are charges for services in regard to several western (Iowa) mortgages, known as the Harmon, East, Sumner, Crawford and Daubendick securities. It appears from the testimony, as also from the bill of Snider & Hopper, that these services were wholly in the form of correspondence and inquiries by Mr. Snider of the western agents or attorneys who had charge of the same at the time of the intestate's death. All legal services in relation to them seem to have been performed by the western agents or attorneys, and who appear to have been employed and paid to attend to those legal matters. I find nothing specified in the testimony as to the performance by Snider & Hopper, of any service requiring special legal knowledge or experience. Indeed, I rest this proposition entirely upon Mr. Snider's testimony. The following is an extract from the same: "What was there about that Sumner matter that required the services of an attorney, as distinguished from such services as an officer of the trust company could per-

form? Answer. I don't know what the officers of the trust company could have performed. They asked me in relation to those western securities, and I did what I have stated here. Question. Now, about those other western securities; what was there about them that required legal services, as distinguished from such services as those officers might have performed? A. Well, I don't know what the officers might have performed. Attorneys perform many things that men who are not attorneys can do just as well. I did whatever the trust company wanted me to do in relation to those mortgages. I don't think it is for me to pass upon that. I did what they wanted me to do." Then followed some further testimony in the same line, at the close of which the witness gave this answer: "The same service might have been done by a man who was not an attorney, and consequently might have been done by an officer of the trust company."

This testimony shows without question a contract of employment between Snider & Hopper and the administrator, and for any and all services performed thereunder the administrator became individually responsible and liable, and is legally obligated to pay. But as to that this court has nothing whatever to do. That is a matter to be adjusted and determined as between the attorneys and the trust company individually, and not as administrator. We have here only to do with the question as to whether the expenditures are properly chargeable against the estate as between the parties interested in the estate and the administrator, and, as we have already made it appear from the statute and authorities construing the same, for such services as were rendered with reference to those securities the administrator cannot charge the estate or be reimbursed therefrom, as the commissions are the compensation for that work. If the administrator sees fit to not personally perform these ordinary services attendant upon the performance of the trust he assumes, but employs an agent or attorney to perform the same, then he must individually make payment therefor. The charges for the services rendered in relation to these securities are ac-

cordingly wholly disallowed, except for the preparation of the assignment of the Sumner mortgage, which is allowed at five dollars, as the value is stated by Mr. Snider. As to the services rendered in regard to the collection of the note against Green & Son, none were such as made it necessary to employ a lawyer. No legal steps or proceedings whatever were taken. The officers of the administrator or its employes could and should have rendered the same for the commissions. Mr. Snider admits that the administrator could probably have collected the claim. No allowance can be made for that service.

In the Grove matter there appears to have been a litigation pending at the time of the death of the intestate in which the intestate was represented by an attorney by the name of John J. Gleason. Nothing whatever has been done in that matter since the intestate's death, except to pay Mr. Gleason's bill for his services, and obtain the papers from him with his consent to a substitution of another attorney for the administrator. This matter may be eliminated from consideration at this accounting, and reserved for disposition upon a future accounting, when the litigation may be finally adjusted or determined. Inquiry as to the bank stock and Balch and Haring notes were all the services that were rendered as to those matters, and, for reasons already assigned as to other similar charges, the same are not allowed. The claim for reimbursement for services in reference to the Brigantine Beach properties was withdrawn, as the same related to the real estate over which the administrator had no jurisdiction or supervision. A decree may be settled and entered accordingly.

In re MABIE'S WILL.

(Surrogate's Court, Rockland County, Filed September 16, 1893.)

1. WILL—UNDUE INFLUENCE.

Testatrix made her will at the age of 80, leaving legacies to her brothers and sisters, amounting to about one-third of her estate, and bequeathing the residue to her nephew and niece, with whom she had then resided about two months, and with whom she continued to reside till her death, about five years subsequently. She had at one time declared her intention to leave her property equally between her brothers and sisters. There was no direct evidence of restraint or undue influence, nor could same be inferred from the evidence. The nephew and niece testified they knew nothing of the will having been made or of its contents till some time after testatrix's death. *Held*, that undue influence was not established.

2. SAME—MENTAL CAPACITY—WHEN SUFFICIENT TO SUSTAIN WILL.

Although such a testatrix was just beginning to betray evidence of senility from the fact that her memory was impaired, and that she would fail to recognize acquaintances or call them by wrong names, and there was also evidence of eccentricities and peculiarities in her actions and conduct, *held*, that as she remembered all her immediate relatives, all of whom were mentioned in the will, and as the aggregate of the legacies showed she had a clear comprehension of the amount of her estate, and that no one but herself gave the particulars for the provisions thereof to the attorney who prepared the will, she had sufficient testamentary capacity, although the case was a marginal one.

Probate of will of Mary Mabie, deceased. Granted.

A. & A. X. Fallon, for proponent (Abram A. Demarest, of counsel); Arthur S. Tompkins, for contestants.

WEIANT, S.—Mary Mabie, the testatrix, made and executed the instrument, the validity of which is contested herein, on the 3rd day of January, 1887. She died on the 3rd day of October, 1891. She was not the owner of any realty, and left an estate of the value of between \$10,000 and \$12,000. By this writing she first directed that all her debts and funeral expenses should

be paid; secondly, she bequeathed to her sister Ann Brooks the sum of \$1,000, and certain articles of household furniture; thirdly, she bequeathed to her sister Phebe Harris the sum of \$1,000, and also certain articles of household goods and personal apparel; fourthly, she gave to her sister Matilda Moore the sum of \$500, and a "parlor settee;" fifthly, she bequeathed to her brother John Westervelt the sum of \$700; sixthly, she gave to her brother Jesse Westervelt the sum of \$300, and all the wearing apparel of her deceased husband, Cornelius P. Mabie; seventhly, she bequeaths to her niece and namesake, Mary A. Blauvelt, wife of Abram Blauvelt, the sum of \$6,000, and the articles of household furniture and wearing apparel not by her will otherwise bequeathed; and, eighthly, she bequeathed and devised all the rest, residue and remainder of her estate, real and personal, to Abram Blauvelt, the husband of her said niece, Mary A. Blauvelt. She appointed said Abram Blauvelt sole executor of her said will. The testatrix was about 80 years of age at the time of making this will, and left no children or descendants of any. Her husband, above named, had died in April, 1886. The brothers and sisters named in the will were her nearest relatives. She and her husband had always resided together at the place of their residence at the time of his death, or in that vicinity. For about six months after Mr. Mabie's death, the testator continued her residence at the homestead occupied at the time of his death, and then, on Thanksgiving day, in November, 1886, she changed her home to that of her niece, Mary A. Blauvelt, and her husband, Abram Blauvelt, at Piermont, a distance of two or three miles from her said residence. She continued to reside with said niece and her husband during the remainder of her life, and died at their home on the date above specified. While residing with her said niece at Piermont aforesaid, she executed this will in question, in due form of law. The due execution of the same is not challenged, but the contestants object to the admission of the will to probate, on the grounds that the testatrix was of unsound mind at the time of the execution thereof, and not having sufficient capacity of mind to be legally

qualified to make the same, and that the same was brought about by undue influence and fraud, and was not her free act and deed. Upon those two questions a considerable mass of testimony was taken, covering about 1,400 pages, besides the documentary evidence, and detailing facts and circumstances bearing chiefly upon the mode of life of the testatrix, and her condition mentally and physically.

After a careful and deliberate consideration of this evidence and of all the facts and circumstances, I have reached the conclusion that this will must be admitted to probate. The proof shows the facts above collated, and as to which there is no dispute. While the testatrix was residing at Piermont, with her said niece and her husband, shortly prior to January 3, 1887, word was left at the residence of Andrew Fallon, lawyer and near resident, through which he was requested to call at Mr. Blauvelt's house. He answered this request, and saw Mrs. Mabie. He was alone with her in the house about 20 minutes or half an hour, during which time she gave him instructions as to the preparation of her will and the provisions thereof. Upon the completion of the interview, Mr. Fallon informed her that, as soon as he had the will prepared, he would come with it, and bring his son as a witness if she assented to it. Mr. Fallon prepared the will accordingly, and called upon her at Mr. Blauvelt's house, with the will, on January 3, 1887, and took his son with him. He then, upon entering the house, went into a room with Mrs. Mabie alone, and closed the door. Both sat down, and Mr. Fallon read the will to her. He asked her if that was correct. She said it was. He laid the will upon the table, and told her he would call his son in. He did so, and again closed the room door. Then followed the execution of this will by the testatrix before the two subscribing witnesses alone, in full compliance with the requirements of the statute as to the execution of wills. Mr. Fallon then asked the testatrix what she wanted done with the will, and she answered that she desired him to keep it. He then placed it in a sealed envelope, and took it to his office, where it remained until produced in

this proceeding. The testimony of these subscribing witnesses contains the other usual statements of facts as to the sound mind, memory and understanding of the testatrix, and that she was under no restraint. It thus appears that the testatrix duly executed this writing as her last will and testament; fully complied with the legal requirements; that she was in proper condition mentally to dispose of her estate; and that she was free and unrestrained in so doing. It also appears from that testimony that the testatrix had testamentary capacity, and a present knowledge of the contents of the will, and a comprehension of the act of making the same. It then rested upon the contestants to meet this condition of the case, and show that either the one or the other of the objections interposed was established. As to the restraint or undue influence upon the testatrix, there is no direct evidence; nor is there sufficient from inference, if any such there be, upon which the finding may be rested that she was such undue restraint or influence when she made this will. If there is testamentary capacity and a present knowledge of the contents of the will, and the will is executed pursuant to the formalities prescribed by the statute, it can only be avoided by proof of influence amounting to force or coercion, and the burden is on the party making the allegation that the testatrix was imposed upon, or overcome by the acts or practices of the beneficiary. *In re Martin*, 98 N. Y. 193; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. Rep. 874; *In re Williams' Will* (Sup.), 19 N. Y. Supp. 778, and cases there cited. And this kind of influence will not generally be presumed. *Marx v. McGlynn*, 88 N. Y. 357. It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence. There must be evidence that he did exert it. *Cudney v. Cudney*, 68 N. Y. 148; *In re Smith's Will*, 3 N. Y. St. Rep. 137; *In re Clausmann*, 9 N. Y. St. Rep. 182; *In re Thorne's Estate* (Surr.), 7 N. Y. Supp. 198; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387-394; *In re Phalen's Will* (Sup.), 19 N. Y. Supp. 358. In *Re Phalen's Will*, *supra*, which is a decision of the Supreme Court at General Term in the first department, and

which case was a contest of a will or codicil thereto, on the ground that its execution was procured by undue influence exercised by a daughter of the testator, it appeared that the instrument was prepared in accordance with the instructions of the testator; that it was read to him before he signed it, and was executed in the presence of the subscribing witnesses only; and there was no evidence that the daughter knew that its execution was contemplated before it was done. It was held that no undue influence was shown, though it was in evidence that the daughter lived in an adjoining house of her father, with an opportunity to influence him. The facts in this case are quite in line with those in that cause, and both Mr. and Mrs. Blauvelt testify that they knew nothing of this will having been made or of its contents until some time after the death of the testatrix. Nor is an unequal distribution of a testator's estate, as the contestants claim, of itself sufficient to justify the conclusion or inference of undue influence. *In re White*, 15 N. Y. St. Rep. 753; *In re Tracy*, 11 N. Y. St. Rep. 103. Inequality of a will alone is not sufficient to establish undue influence. *In re Lasak*, 10 N. Y. Supp. 844. It is the rule that a testator may make such disposition of his property as he desires, although the disposition may appear unjust and inequitable, or even absurd, to others. *Potter v. McAlpine*, 3 Dem. Sur. 108; *In re Mondorf*, 110 N. Y. 450, 18 N. E. Rep. 256; *Horn v. Pullman*, 72 N. Y. 269; *In re Williams' Will* (Sup.), 19 N. Y. Supp. 778, and cases there cited. The change from the prior declared intention of the testatrix, to divide her property equally between her sisters and brothers, to the dispositions in this will, may have seemed well to her. It may have been unjust towards her sisters and brothers, but that furnishes no ground in law for disturbing this will. *Horn v. Pullman*, 72 N. Y. 278; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *In re Williams' Will*, *supra*.

In the consideration of this question of undue influence, I have kept in mind the confidential and close relation that existed between the testatrix and Mr. and Mrs. Blauvelt. Mrs.

Mabie was at all times near them or some member of their household, and at all times accessible to their influence and persuasion. Mr. Blauvelt was her business agent, and managed her property, and transacted her matters in the way of purchases and disbursements. She evidently intrusted all such matters to his care and attention, and paid him \$10 per week throughout the whole period of her living with him, for her board and maintenance. These relations of these legatees and devisees were therefore such as require close scrutiny of their conduct towards, treatment of, and dealings with, the testatrix, to see whether, under such favorable circumstances, these beneficiaries used any illegitimate means or influence, or exercised their power and used their confidential relation, to bring about a disposition of the estate more favorable to themselves, and different from the intent and purpose of the executrix. I have so considered that subject and applied that rule. And I have also kept fully in mind the fact of the impaired physical and mental condition of the testatrix, as disclosed by the evidence, and which is more specifically referred to and considered hereinafter, for in her condition she was much more susceptible to undue influence, deceit, or fraud than when she was in the vigor of her womanhood. And I have also remembered the well-founded proposition that it is rarely the case that direct evidence can be furnished that undue influence has been exercised over the mind of a testator in the making of a will, and yet that the circumstances attending the transaction may, however, be of such a character as to lead irresistibly to the conclusion that undue influence has been at work in its preparation and execution, and that the will is not the free and untrammelled act of the deceased. But notwithstanding that the case is one fully open and opportune to the action of these two legatees and devisees, if they saw fit to avail themselves of those advantages to secure these favorable bequests and devises of the testatrix, the answer to the claim of the contestants is that there is no evidence of any act, word, or movement of either to secure or obtain the making of this will at all, and especially not as to its provisions.

We now come to the consideration of the question of the capacity of the testatrix to make this will. The general rule of law as to the sufficiency of the capacity to make a valid will is simply whether a decedent has sufficient intelligence to comprehend the condition of his property, his relations to those who are or may be the objects of his bounty, and the scope and meaning of the provisions of his will; and, if it is his free act, it will be sustained. *Horn v. Pullman*, 72 N. Y. 269; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Cornwell v. Riker*, 2 Dem. Sur. 354; *In re Williams' Will* (Sup.), 19 N. Y. Supp. 780; *In re Snelling*, 136 N. Y. 515, 32 N. E. Rep. 1006. Upon the whole case, the conviction has come to my mind that the testatrix had sufficient capacity to place her within the requirements of this rule, although the case is a marginal one. The testatrix was a very old person, but no presumption of incapacity arises from old age alone. *Horn v. Pullman*, 72 N. Y. 269. "A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite." *Cornwell v. Riker*, 2 Dem. Sur. 354-366, and the authorities there cited. It is true that the evidence shows that the memory of the testatrix was impaired at the time of the making of this will. Many instances of her forgetfulness appear from the testimony. She would frequently hide or misplace articles of food, clothing, and other things about her house, and be unable to state where the same were, or have any recollection as to the same. She would at times fail to recollect or recognize acquaintances, and address persons whom she knew well by wrong names. But failing memory does not *per se* establish want of capacity. *In re Stewart's Will* (Sup.), 13 N. Y. Supp. 219; *Delafield v. Parish*, 25 N. Y. 9. There is evidence, also, of eccentricities and peculiarities in her actions, conduct, and sayings. She had a child born in her early life, some 30 or 40 years before her death, and which died while still in its early childhood. She seems to have been deeply attached to it, and manifested it by her conduct and speech, and even during these late years of her life would frequently speak of

him, and compare him with young persons in a manner which was eccentric and peculiar. She became less tidy in her dress and in conducting her household duties. She, in a measure, became incapable of doing her work in her usual manner, inso-much that relations, her sister Mrs. Harris and her husband, were engaged to assist her in her household work, and to so far as necessary care for her. They commenced about the time of her husband's last illness, and continued until Thanksgiving in 1886, when she was taken to the home of Mr. and Mrs. Blauvelt, with whom she made her home during the remainder of her life. The testatrix was, as she grew older, gradually losing her physical and mental powers. But I do not think that she had reached that condition of mind that she was incapacitated from making this will, and it is her capacity at that time that must apply. She had entered upon and was passing through the period of senility, but had not then reached the condition that disqualified her from making her will. Matters were apt to slip from her memory, but, when the same came to her attention or thought, there is no real proof that she did not treat them and speak of them with reason and sense. It was only after its dismissal that her weakness was shown by her failure to recollect. It appears, however, that one brother was dead when she made the will, but his residence was in a distant State, and it might well be that she had not then learned of it. There was no proof that she ever had. She gave to the attorney who drew the will, and who became one of the subscribing witnesses thereto, the particulars for the provisions thereof. They appear to have been comprehensive. She remembered all of her immediate relatives, being her brothers and sisters, for each one is mentioned in the will, and a bequest made to each. She named the specific amounts to be given to each, and the residue to Abram Blauvelt. The aggregate of the specific legacies of money is \$9,500, which shows pretty clear comprehension by the testatrix of the amount of her estate that she had to dispose of. She names each brother and sister. It seems to me, it being clear that no one but herself gave the directions for the pro-

visions of the will, that she fairly comprehended and fully understood what she was doing. On the occasion when she executed the will, it was read to her, and she gave her assent that it was correct. She then executed it, and with no one present having any interest in its provisions or her estate. Her signature is remarkably well written for one of her age, and in itself bears evidence of good physical health, and also corroborates the claim of her sufficient mental capacity. Then, in corroboration and confirmation of all that took place in the preparation of this will, and the execution of the same, and to sustain its validity, it appears that the preparation and the charge of the execution of the same were put into the charge of one of the most experienced lawyers in such matters within the county, and of whose fairness and integrity none has the slightest suspicion. He and his equally reliable son, also well experienced in such matters, testify as to the soundness of the mind and understanding of the testatrix at that time, and I am impressed that they would not have done so had there been any manifestation on the part of the executrix that indicated that she did not fairly comprehend and understand what she was doing.

The testamentary capacity is not, in the eye of the law, conditioned upon the possession of sound health or of great intellectual vigor or activity. *Cornwell v. Riker*, 2 Dem. Sur. 367. And incapacity to make a will cannot be inferred from an enfeebled condition of body or mind. *Horn v. Pullman*, *supra*. Proof that a testator, though somewhat forgetful, was capable of appreciating the nature of his act, and the proper objects of his bounty, of selecting the draughtsman, and of designating, without prompting, the one in whose favor he makes the will, was held sufficient to establish his capacity. *In re Stewart's Will* (Sup.), 13 N. Y. Supp. 219 (citing *Delafield v. Parish*, 25 N. Y. 9); *In re Stewart's Will* (Sup.), 15 N. Y. Supp. 601; *In re Snelling*, 136 N. Y. 515, 32 N. E. Rep. 1006. Even entertaining a delusion in respect to an heir is not sufficient of itself to justify rejection of a will. *In re Fricke's Will* (Sup.), 19 N. Y. Supp. 315. *In Re Phelps' Will*, 19 Wkly. Dig. 293,

it was held that the fact that a testator, instead of giving his property to his blood relations, bequeathed it to relatives of his wife, under the belief that the former were negligent of him, and careless of his comfort, will not of itself, unaccompanied by fraud, coercion or undue influence, be sufficient to invalidate his will, deliberately made when in full possession of his faculties. Where a testatrix was 90 years of age, and very weak physically, but managed her affairs, and although there was testimony that her mind at times would wander, it was held that she had sufficient capacity. *In re Gray's Will* (Sup.), 5 N. Y. Supp. 464. The like rulings were made in *Re Bartholick's Will* (Surr.), 5 N. Y. Supp. 842; in *Re Darling's Will* (Sup.), 6 N. Y. Supp. 191; in *Re Bennett's Will*, id. 199; in *Re Berrien's Will* (Surr.), 5 N. Y. Supp. 37, affirmed 12 N. Y. Supp. 585. In the latter case Judge DANIELS wrote the opinion at General Term, and the case is very similar to this upon the facts. Testimony as to eccentric mental condition of the testator, and defective memory, was held, under the circumstances, insufficient to justify setting aside a will disinheriting the heir of the testator. *In re Merriam's Will* (Sup.), 16 N. Y. Supp. 738. Among the cases hereinbefore cited there are several very much in line with this upon the facts and circumstances, and the condition and conduct of the decedent, and the decedent's physical and mental condition; and, within the legal rules cited, the testamentary capacity of the decedent was held sufficient. *Horn v. Pullman*, 72 N. Y. 269; *In re Berrien's Will*, *supra*; *Van Guysling v. Van Kuren*, 35 N. Y. 70. The testatrix had entered upon the stage of her life known as senility, and her physical and mental powers were gradually failing and weakening, but it appears that she still retained the capacity, when an ordinary business matter was present to her mind, to understand, consider and dispose of the same intelligently and knowingly. It seems that she had sufficient memory to collect in her mind, without prompting, the particulars or elements of the business transacted, and to hold them in her mind a sufficient length of time to perceive, at least, their obvious relations to each other, and

be able to form some rational judgment in relation to them. She was, therefore, within the rule that a testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and competent to dispose of his estate by will. Let findings and a decree be submitted accordingly.

In re Roos' ESTATE.

(Surrogate's Court, New York County, Filed June, 1893.)

1. WILLS—CONSTRUCTION—INCOME.

A testator, by the fifth clause of his will, provided for the investment during the lifetime of his widow of the surplus of his personal estate after carrying out the provisions of his will, and directed the division of the investment and its accumulations, together with his residuary estate, among certain designated persons upon the death of his widow. *Held*, that the provision was invalid, as involving an accumulation of the income and profits of personal property not authorized by 4 Rev. Stat. (8th ed.) p. 2516, pt. 2, tit. 4, c. 4, secs. 3 and 4.

2. SAME—PRINCIPAL.

Notwithstanding the illegality of the direction for accumulation of income, the provision for the ultimate division of the principal of the fund is not illegal.

3. SAME—INCOME.

The distribution of such accumulated income is provided for by 4 Rev. Stat. (8th ed.) p. 2435, tit. 2, art. 1, c. 1, sec. 40, declaring that when, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or ownership, during which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate, and such section applies to personal as well as to real property.

4. SAME.

A provision in the will for the annual payment of \$1,000 to the executors by certain devisees mentioned in the second paragraph of

testator's will does not, in itself, involve an unlawful, or any, accumulation, as such annual payments will go into the *corpus* of the residuary personal estate, unless otherwise appropriated for the lawful purposes of the will, and augment such *corpus* for investment and ultimate division and distribution.

Construction of part of will of Augustus Roos, deceased.

John B. Pannes, for executors; Deyo, Duer & Bauendorf, for Charles Roos and Frederick Roos (Robert E. Deyo, of counsel).

FITZGERALD, S.—The testator, by the fifth clause of his will, provides for the investment during the lifetime of his widow of the surplus of his personal estate after paying legacies and carrying out the provisions of his will, and directs the division of the “investment” and the accumulations thereof, together with his residuary estate, among certain designated persons upon the death of his widow. The provision for investment for the purpose specified is invalid, as involving an accumulation of the income and profits of personal property not authorized by law. An accumulation of such income and profits is only allowed for the benefit of a minor, and must cease at the expiration of his minority. 4 Rev. St. (8th Ed.) p. 2516, pt. 2, tit. 4, c. 4, secs. 3, 4. The illegality of the direction for accumulation does not vitiate the provision for the ultimate division of the principal of the fund. That is valid. The disposition of the surplus or accumulated income is provided for by the statute. It declares that when, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate. Id. p. 2435, tit. 2, art. 1, c. 1, sec. 40. This section, although embraced in the title in respect to real estate, has been held applicable to personal as well as real property. Kilpatrick v. Johnson, 15 N. Y. 322; Gilman v. Reddington, 24 N. Y. 19. The parties

in the present instance who are entitled to the surplus or accumulated income by virtue of the provision of the statute cited are those among whom the residuary estate is to be divided, and they share in the income in the same manner and proportion as they share in such estate. *Kilpatrick v. Johnson*, 15 N. Y. 322; *Gilman v. Reddington*, 24 N. Y. 19. The provision for the annual payment of \$1,000 to the executors by the devisees mentioned in the second paragraph of the will does not in itself involve an unlawful, or any, accumulation. The annual payments, as made, will go into the *corpus* of the residuary personal estate, unless otherwise appropriated for the lawful purposes of the will, and augment such *corpus* for investment and ultimate division and distribution. The result may be an increase of the surplus or accumulated income of such estate. How such surplus is to be dealt with I have already indicated. There is no doubt that the annuity to decedent's widow is entitled to be paid from the income of decedent's estate not otherwise disposed of, including such part of the income as may come from the investment of the amounts required to be annually paid under the second clause of the will. In case of any deficiency of income of one year to pay the annuity for that year, the surplus income of the succeeding year could be used to supply the deficiency. Whether any of the surplus income of a previous year is to be retained to meet any insufficiency of income of a succeeding year to satisfy the annuity is unnecessary to determine, as the facts or circumstances, as far as they are disclosed, do not justify any apprehension of such deficiency. Among the beneficiaries entitled to share in the surplus income are the two devisees named in the second clause of the will, and who are obligated by the provisions of this clause to pay to the executors annually the sum of \$1,000. No question is raised as to these provisions save the one respecting accumulation, and that has been disposed of. The share of these devisees in the surplus income should be withheld until they shall have discharged the amounts due and unpaid of the sums required to be annually paid by them. The appropriation of their shares towards the discharge

of their obligation I see no objection to, and it may be properly made. As far as it appears, the whole surplus income now in the hands of the accountants can be distributed. The parties, however, in view of what has been said, can doubtless agree on the amount to be distributed.

In re HALL'S WILL.

(Surrogate's Court, New York County, Filed July, 1893.)

1. WILL—KNOWLEDGE OF CONTENTS.

When the execution of a will has been proved, the presumption is raised that testatrix knew its contents.

2. SAME.

In such case, however, if there is evidence of fraud and undue influence, affirmative proof of knowledge by testatrix of the contents becomes necessary.

3. SAME.

When the evidence shows that five days before the execution of her will the testatrix heard it read to her, and that at the time of execution she declared in the presence of witnesses that she knew its contents, and that at the time of such execution she was of sound mind—*held*, that this constituted affirmative proof that testatrix had knowledge of the contents of the will.

4. SAME—MENTAL CAPACITY AT EXECUTION.

If when testatrix executed her will, she fully comprehended the business she was about to transact, and had in view the nature and extent of her possessions, and knew those who had claims upon her bounty, and acted of her own free will, it is immaterial that about eight days previously she had recovered from a stupor which the doctor pronounced coma, and which had lasted a few days.

Probate of will. Granted.

D. McLean Shaw and Mellen & Devernay, for proponent; Hornblower, Byrne & Taylor, for contestants.

FITZGERALD, S.—The paper propounded as the will of the decedent, Mrs. Lisinka Hall, was executed in the evening of December 20, 1892. By it she bequeathed \$1,000 and a gold watch belonging to her late husband to her nephew William L. Hall, and \$1,000 to be expended by her executor for a window in the Presbyterian church at North East, Pa., as a memorial of her late husband. She devised the house and lot No. 83 East Tenth street, in this city, to her nephew Elmer E. Ross, and directed that the residue of her estate be converted into money, and the proceeds be divided equally among her nieces Mrs. Loomis, Mrs. Buckle, Mrs. Force and Mrs. Ross. The legatees designated as nephews and nieces were not of kin to Mrs. Hall. They were a nephew and nieces of her husband, except Ross, who was the husband of one of the nieces. The paper names E. Van Ness Heermance, an attorney, sole executor, and revokes all former wills. The house and lot devised are leasehold property. An answer to the petition for probate was filed March 25, 1893, by Joseph C. Hurley and Mark W. Potter, the executors named, one in a will executed November 18, 1890, and both in a codicil thereto executed October 14, 1892. It alleges that the execution of the paper propounded was not the free, unconstrained and voluntary act of the decedent, and that she was at that time mentally incompetent to make a will. In the determination of the issues thus raised it is necessary to consider the testimony of persons present at the execution of the paper, the relation of the decedent to the various parties, her age, her personal characteristics, the condition and extent of her estate, her surroundings, and the probabilities of the paper representing her real wishes. The first witness examined was Benjamin F. Eberts, a subscribing witness. He states that on the evening of December 20, 1892, he and Theodore P. Bucher, another subscribing witness, were in the reception room of Mrs. Hall's house, No. 83 East Tenth street; that Heermance, the attorney,

came in about 9 o'clock, and a half hour after the third witness, Dr. Sheppard, who was Mrs. Hall's attending physician, arrived. He spoke to them, and then went to her apartment on the floor above. When he returned, Heermance went up, leaving the others in the reception room, in conversation, and on returning he asked them up. Eberts states that, when they entered the room, Mrs. Hall was in bed, with the will in her hand. That Bucher asked her if she thought she could write, and she said "Yes," she thought so, and worked her fingers as if in writing. That Dr. Sheppard asked her if the paper was her will, and she said "Yes." That Bucher dipped the pen in the ink. She took hold of it and started to write, but the pen was not satisfactory; and Bucher asked her if he could assist her, and she made an affirmative reply. That Bucher then took hold of her hand, and helped her to write her name, and when the signature was half completed she looked up, as if she wanted more ink, and Bucher filled the pen again, and assisted her to complete the signature. Heermance then asked her if the paper was her last will and testament, and if she desired Bucher, Dr. Sheppard, and Eberts as witnesses to the will, to which she responded, "Yes, I do," and then each signed the paper in her presence. Dr. Sheppard states that on the occasion he asked Mrs. Hall if the paper was her will, and he said he hoped it would be satisfactory to her, and she said, "Yes;" that, after it was signed by her, Heermance asked her if this was her last will and testament and if it was all right, and she said "Yes." Bucher testified that, when the three witnesses and Heermance reached Mrs. Hall's room, she had the will in her hand. He agrees with Eberts in his statement of the facts that occurred, and states, in addition, that he procured a small mirror, on which the will was placed, and that after she had completed her signature he asked her if the paper was her last will and testament, and if she knew its contents, to which she answered "Yes" to both questions; that Heermance then read some clauses of the paper, and in response to a question by him, if she desired them to sign as witnesses to her signature and seal, she answered,

"Yes." Each of the subscribing witnesses testify that Mrs. Hall was of sound mind, and that she acted without restraint. They did not, however, hear the will read to her, and it is apparent from their testimony that no word was used by her, except the affirmative expression, "Yes," in response to questions put to her, and which, under the law as declared by our courts, was a substantial compliance with the requirements of the statute of wills.

If, at the time of the execution of the paper, Mrs. Hall knew its contents, a clear, *prima facie* case has been made out, to sustain probate. But contestants' counsel claim that the testimony shows that Mrs. Hall had not at the time been told the contents of the paper, or, if she had, she did not have the mental capacity to execute a valid will. Under section 835 of the Code, Heermance was not a competent witness; but, as no objection was made to his testimony, he was examined. In determining the controversy, however, I shall give no consideration to his evidence in respect to any interview with the witness and decedent respecting instructions for, and advice given with reference to, the preparation of the will, or statements involving communications not made in presence of other witnesses.

To sustain the probate of a will, it must be shown to the satisfaction of the trial court, by direct proof, or as a legal inference from the evidence, that the testator was competent to make it, and knew its contents. There is abundant authority in the decisions of the courts, both in England and in this country, that in the case of a competent testator, where there are no circumstances showing want of good faith, it is not necessary to prove that the testator gave the instructions for the will, that he read it, that it was read to him, or that he was made acquainted with its contents at the time of execution. In *Pettes v. Bingham*, 10 N. H. 514, it was held that a testator is presumed to have knowledge of the will he has executed; and if it is alleged that he has not knowledge, or that he was induced to execute it by misrepresentation, the burden of proof is with those who make the objection. In *Carr v. McCamm*, 1 Dev. & B. 276, the court

held that under the law it was not incumbent on the proponent to produce other and distinct evidence that the testator knew the contents of the paper, above what presumptively arose from its formal execution. In *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. Rep. 522, the testator had made a previous will, and had requested the draughtsman to make some changes in it, and to bring a new will. This was done. The testatrix signed it in the presence of the witnesses. The draughtsman then offered to read it to her, and she declined, stating that he could do it some other time, and requested him to keep it in his custody, and it remained with him until her death; she never having read it, nor was it ever read to her. The will was admitted to probate. In *Vernon v. Kirk*, 30 Pa. St. 218, the court held that when the execution had been proved the law raised the presumption, affirmatively, that the testatrix knew the contents of the paper, the presumption being drawn from the ordinary conduct of mankind; that men did not ordinarily sign papers without a knowledge of what is embraced within them; and this is true alike of men who can read, and those who cannot. But when fraud appears, and undue influence is charged and proved, affirmative proof of the knowledge of the contents of the paper set up as the will may be necessary, but in no other case; and the cases in which affirmative proof of the knowledge of the contents has been held essential, after the execution of a paper has been shown, are, almost without exception, those in which such proof has been needed as an answer to a charge of imposition upon the testator.

Under the principles of law thus laid down, I must hold, presumptively, and without reference to the extrinsic evidence which I shall hereafter advert to, that Mrs. Hall knew the contents of the instrument at the time of its execution. But it is claimed by the contestant that this presumption is negatived by evidence of the existence of fraud and undue influence. This makes it necessary to consider the evidence adduced. Mrs. Hall was 71 years of age, and had been a widow for 10 years. She was by birth a Russian, but had been a long time away from her

native country. She spoke English and German very fluently, was educated, and was shown to have some critical knowledge of the literature of the German language. She had inherited or had acquired a considerable estate, which she had lost through bad investments made by her husband; but she died possessed of the leasehold property, No. 83 East Tenth street, and some securities contained in a safe-deposit box, the value of which has not been proven. She was childless, and, so far as appears, she left no next of kin. The successive testamentary instruments, as they have been disclosed on the trial, are important to consider in deciding the issue of fraud and undue influence. It appears that in 1889 she executed a will, the general scheme of which is like the paper under consideration, except that Ross was not named as a legatee. In November, 1890, she executed another, in which Hurley, one of the contestants in this proceeding, was the principal beneficiary. To this, in October, 1892, she made a codicil, by which Hurley's beneficial interest was increased. The will and codicil, in which Hurley was the principal legatee, were offered for probate, but none of the documents was formally put in evidence. They were, however, referred to in the examination of the witnesses, and treated, at least as far as concerned the purpose for which they are now adverted to, as if before the court. A little over two months after the date of the codicil to Hurley she executed the paper now under consideration. Of equal importance are Mrs. Hall's declarations of a testamentary purpose. In the summer of 1892, and at different periods—one as late as five days before the execution of the paper propounded—she is shown to have made statements indicating dissatisfaction with Hurley, and even denying that she had made a will in his favor, and stating that if she had she did not know it. She said, however, that she had signed some paper, the nature of which she did not understand, and feared she had signed away her property to him, and she desired to know how it could be avoided. Two of the parties to whom she made such statements, in the summer of 1892, were Mr. Vose, an officer of a safe-deposit company, and Mrs. Win-

ston, an old friend. In August, 1892, she stated to Mr. Force, the husband of one of the legatees of the residuary estate, as a secret, that Hurley had made indecent proposals to her, and had held that fact over her as a threat. Yet, in September or October, Force states that Mrs. Hall told him that she had made a will leaving her property to Hurley and her housekeeper. Then, prior to Thanksgiving day (which was after the execution of the codicil to the Hurley will), she told him that Hurley had dogged her into signing the will, that she wanted to break it, and that she had been to some bank or safe-deposit company to see about it. She further said she did not want Hurley to have any of her property, and would go home and make a new will. These declarations indicate a change in the feeling she had entertained for Hurley which would sufficiently account for her determination to revoke the instrument by which he was to be benefited. Nearly coincident with these expressions of dissatisfaction with Hurley were declarations of Mrs. Hall of a purpose to provide for the nieces of her husband. Later, in 1892, she had begun to tire of the cares of her house, and asked the husbands of two nieces to take it, and each declined. In November she began a negotiation with Ross, the husband of another, to that end; and a lease was executed by Mrs. Hall to him, which was superseded by another that went into effect December 1st, and a few days after Mrs. Ross removed to the house, her husband having been in possession from the 1st. Early in December Mrs. Hall's severe illness began. Then followed events which resulted in a new will—the one now in contest. Mrs. Hall had become acquainted with Heermance, the proponent, through an introduction by Ross. It appears from the testimony of Bucher that the engrossed will, as it now is, with the exception of the last sheet, was produced and read to Mrs. Hall on the night of the 15th of December, when Dr. Sheppard and Bucher, two of the subscribing witnesses, and a Miss Caughey, were present; but, as stated by Bucher, in the reading of the paper, the name of a legatee on the last sheet was wrongly read, the decedent understanding that the bequest of a share of the

residuary estate was given to Mr. Buckle, instead of to his wife, she, the testatrix, under this impression, tore the sheet. This necessitated the re-engrossment of that sheet, and for that purpose it was given to Heermance, who was in the parlor below. Dr. Sheppard did not testify to the reading of the will. On the same evening another paper, declaratory of Mrs. Hall's feelings towards Hurley, came into being. It probably followed the reading and the mutilation of the last sheet of the will. As the will could not be executed, she asked those present to be witnesses to her statement that the will executed in favor of Hurley was wrong. Bucher suggested that such a statement should be in writing, and Miss Caughey wrote on the back of a blank bill-head of Mrs. Hall's the words: "The will made out to J. C. Hurley is all wrong, and I hereby certify to that fact this 15th day of December, 1892, in the presence of witnesses." At the end of this writing she wrote her signature, and Dr. Sheppard, Mr. Bucher and Miss Caughey attested it as witnesses. It does not certainly appear that the reading and tearing of the will preceded the signing of the memorandum which she supposed amounted to a revocation of the will in favor of Hurley, but it is a reasonable inference that such was the order of the two acts from the fact that both documents were there on that night. Miss Caughey was not examined as a witness, as she had gone to Europe, and could not be produced. Hence, I must determine the fact in the light of the testimony of Bucher, with such support as the circumstances of the case afford. He has shown extraordinary lapses of memory, to say the least, in respect of dates and events. This is also true of Dr. Sheppard; and each, by a very unusual coincidence, in his first examination, did not refer to the events that took place on the night of the 15th, when it was claimed that the engrossed will was torn, and the paper written by Miss Caughey was signed by the decedent and witnesses. Dr. Sheppard and Bucher had no abiding interest in this case to prompt their memories in respect to matters collateral to the execution of the will. With one near 70 years old, and the other over 60, it was not to be expected that either, in

the midst of a severe and searching cross-examination conducted by able counsel, would or could at once recall every event connected with matters prior to the execution which might be a matter of primary importance. As Dr. Sheppard states that he made no memorandum of the medical history of the case, by which he could fix dates, but depended upon his unaided recollection to recall its features, he would not be apt to take any greater precaution in a matter not connected with his professional duties. In respect to the execution, his memory had to be jogged before he recalled one important point that he did not at first state—the request by Mrs. Hall for the witnesses to sign the paper. Bucher, however, if he is to be believed, had data in his memorandum book to which he was able to refer after his first day's examination, and thus correct the dates of certain events, and (of his own motion) he made the corrections. The attention of neither had been drawn in his examination to the events that took place prior to the execution. Bucher, late in the trial, testified that he did not state the facts of the reading of the will, and the destruction of the last sheet, and the signing of the paper declaring the will to Hurley "all wrong," because he was not asked. There is nothing improbable in the explanation, coming, as it does, from a disinterested witness. No effort was made to impeach the credibility of Sheppard or Bucher, except by certain self-contradictions and inconsistent statements made by them, and their failure to recall at least one fact of special importance—the reading of the will on the night of the 15th. There is no suggestion that each is not a reputable citizen. While I believe that when Heermance first took the stand he made his testimony to fit the dates testified to by Dr. Sheppard in respect to Mrs. Hall's illness, and the changes which took place, and make it harmonize with Dr. Sheppard's narrative of Mrs. Hall's condition, I do not think that Dr. Sheppard and Bucher recast their testimony, as claimed by contestants' counsel, to suit the exigencies of the case raised by the later statements of Heermance. As their uncontradicted evidence is consistent with Mrs. Hall's declarations of a testamentary pur-

pose, testified to by Mrs. Bernard and her daughter, and by Mrs. Winston, and with the provisions in the will of 1889, and with a changed state of feeling towards Hurley, and inconsistent with any other theory, I am led to the conclusion that on the night of December 15 she did hear the will read, as stated by Bucher, and that, as testified to by Smith, the engrosser, it was the identical paper now under consideration, except the last sheet, which contained the same language as was used in the re-engrossment. In addition to this, at the time of the execution, she declared, in the presence of the witnesses, that she knew the contents of the will. With these facts proven, I need not rely on the legal presumption of knowledge by her of the contents of the will, if she was at the time of sound mind.

Mrs. Hall's mental condition on the night of the 20th of December thus becomes a question of the first importance. I will first consider whether the contestants have adduced affirmative proofs to overcome the testimony of the subscribing witnesses. On that occasion, Mrs. Hall made the simple response, "Yes," to the questions put to her respecting the execution of the will. Such response, in connection with the questions, constituted a sufficient declaration of the character of the paper, and a sufficient request for the witnesses to attest it. Each of the subscribing witnesses, when first examined, had not heard the testimony of the others. I was very favorably impressed with the testimony of the young man Eberts. He had come to reside in the house on the 15th of December, the very day on which the memorandum written by Miss Caughey was signed, and he seems to have been asked to be a witness because of his accidental presence on that occasion. He states that he had heard nothing about the execution of a will until that evening. No attempt has been made to impeach his testimony, and the only fact that would suggest a possible bias is that he was a friend of Ross, one of the legatees. If there was a conspiracy, as claimed by the contestants, the conspirators would not be likely to take in a young man just of age, a stranger to some, and only a recent acquaintance of others, except Ross. He was the first

witness, and his testimony was apparently ingenuously given. Against his evidence is the testimony of Mary Bristol, a woman who was employed in the house as a domestic from the 16th to the 20th of December, during which time she admitted that she saw Mrs. Hall but twice, and during the residue of the month was more or less in attendance upon her until January 1st, when she became her nurse; of Hopkins, a man who attended upon her five days from the 17th to the 23rd day of December, when he was discharged; of Johnson, another man, who did odd jobs about the house before and after the date of the will; and of Dr. Vedder, who was called in by an acquaintance of Mrs. Hall's on the 17th of December, and testified that he found her unable to answer his questions. He says he stayed not more than 15 minutes, and others say that he was there as long as that. There is no doubt that, some time during December, Mrs. Hall was in such a state of unconsciousness, for a period of a few days, that Dr. Sheppard pronounced it coma. He first fixed the period as between the 11th and 15th of December, and later in the trial, when recalled, he corrected the dates, stating that on the 12th she had recovered from the stupor. If, when she signed the will, she fully comprehended the business she was about to transact, and had in view the nature and extent of her possessions, and knew those who had claims upon her bounty, and acted of her own free will, it matters not what may have been her condition before or after. It appears by the testimony that, early in January, Mrs. Hall had recovered from her serious illness, and was up and about the house, and even went below, to the dining room, to her meals. She received those who called upon her, conversed with visitors and the inmates of the house, signed checks which were produced in evidence, and there is abundant proof that, until a few days before her death, her mind was generally unclouded. I do not recall any evidence given that shows that the subject of her will was during that time referred to, but she must have known the fact that she had executed the paper, and, if it did not satisfy her, she had abundant opportunity to revoke it, or make another. The uncontra-

dicted facts bearing upon the question of Mrs. Hall's mental condition, and her knowledge of the contents of the will, on the night of December 20th, are these: In 1889 she executed a will in favor of her husband's nieces, whom she held in high esteem, though they were not of kin to her. In 1890 she made another in favor of John C. Hurley, a stranger to her blood, and with no family connection. Beginning in the summer of 1892, her declarations show that Hurley had fallen into her disfavor. Nevertheless, in October of that year she executed a codicil by which the benefaction to him was increased. Later she stated that she had been dogged by Hurley into making a will for him, and continued thereafter to reiterate her purpose to care for her husband's nieces. Early in December she became seriously ill, and some time during the month—probably the first half—for a period of a few days she was more or less unconscious. On the evening of the 15th a paper was produced to her, purporting to be a will, which, it is claimed, on the testimony of one witness, was read to her in his presence, and in the presence of two others; that she on that occasion tore the last leaf, because of a fancied misstatement of her wish as to one beneficiary named in the residuary clause, which made it impossible to execute the paper that night; that she then asked those present to be witnesses to her statement that the will to Hurley was all wrong, and on the suggestion of one of them a paper was written, stating what she had said. To this she wrote her name, and the signatures of Dr. Sheppard, Mr. Bucher, and Miss Caughey, a friend of Mrs. Hall's, now absent in Europe, attest it as witnesses. On a subsequent evening she spoke to Eberts of her gratitude to Ross for his kindness to her, and stated that he should be paid for it. On the night of the 20th, according to the uncontradicted testimony of Eberts, he and the other subscribing witnesses, Dr. Sheppard and Bucher, went to Mrs. Hall's room, where they found her in bed, with the will under consideration in her possession, it not being claimed that she had then had it more than a few minutes. The formalities of execution were gone through with. Mrs. Hall's signature shows a deteriora-

tion from that made on the paper signed on the evening of the 15th, and it is conceded that Bucher held her hand and assisted her in making it. Eberts testified that on that occasion Mrs. Hall was as bright as he had usually seen her on the preceding evenings when he was with her in her sickness, and that she appeared to be of sound mind, and acted free from restraint. When the paper was produced for probate it was found to conform in every respect to her previously expressed declaration of a purpose to provide for the nieces and for Ross, he and his wife having cared for her from early in December to the date of the will. On these facts, either conceded or testified to by Eberts, who was a stranger to all the parties, if she was of sound mind, the presumption is raised that she knew the contents of the paper at the time of its execution, and that it reflected her wishes. It was incumbent upon the contestants to overcome the case thus made in favor of the will. I was greatly impressed with the argument of the learned counsel for the contestants, and, after reading the volume of testimony, I read his argument again with equal interest. But, after a careful consideration of the whole case, I am compelled to decide that the contestants have not sustained their allegations. The interest of Ross, Mrs. Ross, Mrs. Buckle and Mrs. Force was such that the testimony they gave may have been biased, but Dr. Sheppard and Bucher confirmed the testimony of Eberts in respect to the facts that occurred on the night of the execution of the will. No attempt by extrinsic evidence has been made to contradict their statements. On full consideration I am satisfied that their testimony is true, in respect to the essential facts necessary to establish a will, and that the formalities of the statute have been complied with, and that the paper is entitled to probate. A decree may be presented accordingly.

In the Matter of the Estate of WILLIAM O. STRONG, Deceased.

(Surrogate's Court, Chautauqua County, Filed November 6, 1893.)

EXECUTORS AND ADMINISTRATORS—PERSONAL CLAIM—ESTOPPEL.

By the third clause of his will the testator bequeathed to the claimant, Abram H. Johnson, one of his executors, certain farming tools and other personal property of the value of about sixty-five dollars, with the following provision: "The foregoing bequests to be in full compensation for any and all care said Johnson may render me in my old age." After the will was probated and said Johnson qualified as such executor, he accepted and received all the property so bequeathed to him, as appears by the inventory and account verified and filed, and other evidence. *Held*, that such claimant is estopped from making claim for care and services rendered to testator in sickness in his old age.

Judicial settlement of executor's accounts.

S. P. Fox, for claimant; Towne & Record, for Albert J. Homan and other contestants; A. W. Hull, special guardian, for minors, contestants.

SHERMAN, S.—The testator died January 26, 1892, of the age of over eighty-two years. His wife died May 14, 1881. Decedent left him surviving the following heirs and legatees: Celestia May Johnson, granddaughter, minor, an only child and heir of Abram H. Johnson, said executor; Jenny Pattyson, full age; Emma Osborn, full age; Henry Homan, full age; Edgar Homan and Albert Homan, both minors. All the above named are legatees, and the last five named are grandchildren of the testator and children of Albert J. Homan, one of the executors, and a son-in-law of the testator.

The testator by the first clause of his will directed that all his funeral expenses and just debts be first paid. The will was dated December 16, 1890, and probated June 7, 1892.

By the second clause of his will he bequeathed to his granddaughter, Celestia May Johnson, only child of said Abram H.

Johnson, executor and claimant, his parlor stove, parlor chairs and center table.

By the third clause of his will he bequeathed to his said son-in-law, the claimant, his bay mare, called Fannie, his lumber wagon, cook stove and his one-half interest in his heavy double harness, plow, cultivator, harrow, berry crates and baskets, the other half interest being owned by said Abram H. Johnson. The value of the testator's interest in said property, as appraised, being about sixty-five dollars. Immediately following the description of said property, and in the same clause, the will reads as follows: "The foregoing bequests to be in full compensation for any and all care said Johnson may render me in my old age."

By the fourth clause of his will the testator bequeathed all the rest of his household goods, one-half to his said granddaughter, Celestia May Johnson, daughter of said Abram H. Johnson, claimant, and the other half to his five grandchildren above named, children of the said other executor, Albert J. Homan, share and share alike.

By the fifth clause of his will he bequeathed his gold-headed cane to his said son-in-law, Albert J. Homan, executor.

By the sixth clause of his will he appointed his two sons-in-law, Abram H. Johnson and Albert J. Homan, the executors of his will, and authorized and directed them to sell all the residue and remainder of his real and personal property, and to divide the proceeds thereof between his said six grandchildren, viz.: Celestia May Johnson, Jennie Pattyson, Emma Osborn, Henry Homan, Edgar Homan and Albert Homan, share and share alike, and in pursuance thereof the said executors sold the real estate owned by the testator at his death, consisting of an improved farm, with farm buildings thereon, and containing 35 acres, for \$3,125, and delivered to the several legatees named in his will the personal property bequeathed to them respectively and sold the remainder of such personal property as directed by the will. He directed that his executors should not charge any commissions for administering his estate, and they have not

done so in their account as rendered and filed. He directed that the expenses of administering the estate should be paid out of it.

The testator owed no debts at his death exceeding twenty-five dollars, and his personal property was appraised at \$849.95, as appears by said account filed March 26, 1893, so made and verified by both executors, and is admitted by all parties interested to be correct, and shows a balance of \$3,205.87 in money for distribution to the legatees as provided by said will, less the expenses of the executors in administering the estate.

On the hearing herein for the settlement of said account and for distribution of said funds to the legatees as directed by the will, said Abram H. Johnson, co-executor, presented his personal claim against the estate, amounting to \$1,748.

The testator at his death owned an improved farm with dwelling house and barn and other farm buildings thereon, which the executors have sold as above stated, for \$3,125. The claimant owned a farm of fifteen acres adjoining, with no buildings thereon, used for pasture, meadow and cultivation, of the value of less than one-half of the thirty-five acres owned by the testator.

On the hearing herein no witnesses were sworn on the part of the contestants, except Albert J. Homan, who testified that all the personal property bequeathed to his co-executor, Abram H. Johnson, had been accepted and received by him.

It appeared from the evidence, and was not contradicted, that the testator and his son-in-law, Abram H. Johnson, had worked the two farms and used the same and the products thereof in common, and divided the net avails thereof, after paying for hired help on the farms and in dwelling house, share and share alike, up to the time of the death of the testator, a period of over twenty-five years; that during said time Johnson and his family had lived in the dwelling house and with the family of the testator, all eating at the same table, and that no account was made at the time between them for the board and support of them or of their respective families, nor for pay to their hired help on the farms or in such dwelling house. Evidence of this is con-

firmed by the account and inventory made and verified by both executors and filed.

On the hearing herein the claimant withdrew all his claims as stated in his personal account arising before six years preceding the testator's death, January 26, 1892. These claims so withdrawn covered a portion of the claim of \$624 for helping to attend to the comforts and care of the decedent from November 1, 1885, to November 1, 1891, covering 312 weeks at two dollars per week.

The several claims of the claimant for building a hog pen and three additions to house and furnishing lumber for same, and for helping build barn and furnishing one-half the lumber and shingles, arose over six years before the death of the testator, amounting to \$520, and a portion of them from fifteen to twenty-five years before his death. The same is true for setting out pear and peach trees. In addition to the above the claimant demanded \$144 for services in care of decedent during six years prior to his death, and three hundred dollars for care and services in his last sickness.

The contestants duly objected to all such claims in their verified written answer, and alleged that same were unjust, and that same were outlawed except those arising during six years preceding his death.

The testator was confined to his bed by sickness during about two months preceding his death and was sick on an average about one month in a year, during about five years before he died. Mr. Johnson assisted in taking care of the testator when sick and took the principal care of him in his last sickness.

Alice Morrison worked there in the house as a domestic in his last sickness and has been paid out of the estate for her services \$16.50, as appears by the evidence and by schedule "D" as verified by the executors and filed.

The respective families of the claimant and testator consisted of the testator and his wife, who died May 14, 1881, and who assisted in doing housework for the two families until about the time of her death. The family of the claimant consisted of his

wife, who died June 1, 1890, and was sick during the last year of her life and unable to do any work, and the adopted daughter of the claimant, Cora Donnahue, who went into these two families to live when she was less than a year old and was supported, educated and clothed by the claimant and the testator until about November 20, 1891, she being then about twenty years old; she made no charge for her services, and nothing was paid to her therefor, except in her support. The two families lived together as one family.

All the net products of the two farms after paying expenses of conducting same, including hired help, medical attendance and burial expenses for the two members thereof who died as above stated, were equally divided between the claimant and the testator up to the time of his death, January 25, 1892, except for medical care and attendance upon him, which has since been paid out of his estate. No claim was made that the testator did not do his share of the work on the two farms during twenty-six years preceding his death, excepting the last five years of that time he was sick on an average of about one month in each year and unable to work, but otherwise assisted in the work and management of the business.

The witness, Alice Morrison, niece of the claimant, testified to a conversation with her father at his residence in 1891 in which the testator said that Mr. Johnson should have his pay for what he had done there, and that May, meaning the daughter of the claimant, should have half of the property. Abbie Johnson, the sister of the claimant, and who was present at the same conversation, testified to same conversation substantially as did the witness Alice Morrison; this conversation was a few months after the testator made his will. Alice Morrison also testified that she was present at one time during the last sickness of the testator and heard him say that May should have half of the property, and that Mr. Johnson should have his pay; nothing further.

Abbie Johnson, sister of the claimant, testifying to the same conversation as Alice Morrison above, swore that the testator

said: "Oh, May shall have half!" But the witness did not say anything about the claimant having any part of the property, or any pay for his services.

The testator, after bequeathing, as above stated, to his granddaughter, Celestia May Johnson, his parlor stove, parlor chairs and parlor center table, bequeathed to the claimant the articles mentioned in the third clause of the will and of the value of about sixty-five dollars, as stated by him, "*to be in full compensation for any and all care said Johnson may render me in my old age.*" And then he further bequeathed one-half of all the rest of his household goods, not before disposed of, to the daughter of the claimant, Celestia May Johnson, and the other half to his five grandchildren, being the sons and daughters of his other son-in-law, Albert J. Homan, co-executor, share and share alike, and after giving his gold-headed cane to Albert J. Homan, his son-in-law, he, by the sixth clause of his will, bequeathed and devised all the rest of his real and personal property to his six grandchildren, above-named, share and share alike and directed his executors to sell the remainder of his real and personal estate, which they have since done, and make distribution accordingly, which they have not yet done.

The testator thus disposed of his entire property by his will.

This appears to have been a just, equitable and sensible disposition of the testator's estate, and the claimant having accepted its provisions, as appears in his unverified account and inventory, and by the uncontradicted evidence of his co-executor, Albert J. Homan, I am of the opinion that he is in law estopped from recovering any part of his personal claim herein; he having accepted the property bequeathed to him upon the conditions named with full knowledge thereof, such act must be regarded as an accord and satisfaction of his claim. To allow any part of it would be unjust to the other legatees.

The claimant has not returned, or offered to return, the personal property bequeathed to him under the third clause of the will, and it must be held that he has accepted the bequest under the conditions named; and this without regard to the value of

the property so bequeathed to and received by him. *Caulfield v. Sullivan*, 85 N. Y. 153. *Chamberlain v. Chamberlain*, 43 id., 424, 442-3.

I direct decree disallowing the personal claim of Abram .H. Johnson, with seventy dollars costs against him personally; and also confirming the account of the executors filed March 26, 1893, with costs and expenses on accounting payable out of the estate, to be taxed and adjusted, and inserted in decree on final accounting and distribution to legatees, together with twenty dollars costs allowed to A. W. Hull as special guardian for minors in proceedings on said personal claim, payable out of the estate.

**In the Matter of the Assessment of the Collateral Inheritance
Tax on the Estate of ELIZA C. DOTY, Deceased.**

(Surrogate's Court, Madison County Filed December 27, 1893.)

1. TAX—COLLATERAL INHERITANCE.

Where a clause in a will recites that a legacy is given in view, and in consideration of the legatee's unremitting care and attention to the testatrix during her years of sickness without asking any reward for services rendered, such legacy is taxable.

2. SAME.

In order to be exempt, the legacy must be in payment of a legally enforceable debt.

3. SAME.

The court, in ascertaining whether a legacy is, or is not, taxable, has the right to determine, not only from the provisions of the will, but by extrinsic facts, if necessary, whether it is a voluntary gift or in payment of a legally enforceable debt.

4. SAME.

In such case, the legatee, if he desires to escape the payment of the tax, must establish his debt against the estate, have it paid by the executor in the usual manner, and let the legacy to him go to the residuary estate.

Harvey S. Bedell, for appellant; Charles A. Hitchcock, for People.

KENNEDY, S.—This proceeding is an appeal from the appraisal and assessment of the collateral inheritance tax of \$115.22, upon the legacy given by the will of the deceased to Dr. C. C. Reid, of Rome, N. Y.

The subdivision of the will upon which the question arises is as follows: "I hold a paid up-insurance policy on my husband, R. S. Doty's life, of \$2,320. I now add \$180, making the sum of \$2,500, which I freely give and bequeath to my true friend, Dr. C. C. Reid, of Rome, N. Y., in view and in consideration of his unremitting care and attention to me during my years of sickness without asking any reward for services rendered, as he knew my means were somewhat limited."

The appellant insists that the legacy in question is not taxable upon the ground that he had in fact rendered professional services for the deceased at some period of her life for which she had not paid. Upon the hearing he offered to prove such services, the time when, the amount thereof and the circumstances under which they were performed; but the surrogate held that the proof offered to establish these facts was incompetent, and excluded it; so that the only question to be determined is whether the legacy, on account of the reasons assigned in the will for the bequest, is taxable. We must hold it liable to the tax assessed for the following reasons: The appellant did not appear before the appraiser and establish any indebtedness on the part of the deceased to him for professional services or otherwise, nor did he, upon the appeal before the surrogate, prove that he had any valid debt against her. No indebtedness being established which could be enforced against her estate, the legacy was a voluntary gift on the part of Mrs. Doty, and, therefore, is not exempt from the payment of the tax prescribed by law.

The estate which passes to an heir or legatee, and upon which

a tax is to be assessed, is the amount which remains to be distributed after all the debts and funeral expenses are paid. Hence the existence of a claim which the testator might be honorably but not legally bound to pay is insufficient; it must be one to which there is no legal defense and which the creditor can enforce by legal proceedings. If this were not the legal rule, a testator might either designedly or otherwise defeat the object of the statute and render it practically useless by simply reciting in his will that the legacy is in consideration of care, attention, kindness, favors received from, or services performed by, the legatee at some period of the testator's life. The reasons which a testator may give for making a legacy, while appropriate in explanation of his motives, cannot be made use of either by himself or his legatee to shield a legacy from taxation, because a legacy implies a bounty and not the payment of a debt. Hence the court in ascertaining whether a legacy is taxable or not has the right to determine, not only from the provisions of the will but by extrinsic facts if necessary, whether it is a voluntary gift or in payment of a legally enforceable debt; and if it appears that the legacy was pure gratuity, the legatee, if he accepts it, must take it subject to the conditions upon which it is given, and subject also to the conditions which the law has impressed upon it. The payment of a tax cannot be avoided by the mere phraseology of the will. Declarations of the testator cannot rise above the law and abrogate its provisions. The tax cannot be eluded by the use of words not necessary to make the gift effective. If the alleged debt is not admitted by the executor, or is denied by him, it is the duty of the legatee to establish his debt, if he has any, either by legal proceedings against the executor or by such other proceedings before the surrogate as will enable the court to ascertain its validity and thereby determine whether the legacy exceeds the indebtedness, and, if so, to assess a tax upon the excess. If a testator makes a bequest or devise of property to his executors or trustees in lieu of their legal commissions and allowances, the excess beyond a reasonable compensation for their services is liable to a

tax, and we know of no good reason why a legacy, in payment for services, care, attention rendered a testator, should not be placed upon the same basis. This course protects the state from fraud and prevents legatees from avoiding the tax which the statute has demanded. No injustice is done the legatee by adopting this course, because it is optional with him whether he will accept the legacy with whatever conditions and burdens may be attached to it, or to enforce his claim against the estate. For acts of kindness shown, for favors received, for some act done at an opportune moment, for many nameless things that were beneficial to him, a testator may, at the time of making his will, feel exceedingly grateful, and think it his duty to express his appreciation and remembrance of them by legacies to those who have rendered them; but unless some legal and enforceable claim exist against the testator by reason of them, a legacy thus given in grateful recognition of the kindly act of friends and relatives should be considered a bounty and not the payment of a debt, unless the debt is in some manner established to the satisfaction of the court, and for this reason should not be exempt from taxation.

If the above is a correct statement of the law it follows that the legacy to Dr. Reid is taxable because there is no evidence that it was given in payment of a valid debt, but solely in view of his unremitting care and attention to the testatrix. The words "I freely give and bequeath" indicate that the deceased understood that the appellant had no legal claim against her, but notwithstanding this fact she desired to fittingly recognize the value of his services to her. If she believed that she was indebted to Dr. Reid in a legal sense, but that the debt could not be enforced against her or her estate by reason of the statute of limitations if interposed as a defense, she could have revived the debt by proper allegations for that purpose in her will. So too the appellant has recognized the legacy as a gift and not the payment of a debt because he had presented no claim for any indebtedness to the executor, nor did he appear before the appraiser and claim that his legacy was exempt from

taxation by reason of any debt he had against the estate. He should, therefore, be deemed to have elected to accept the legacy as a gift and should be estopped from asserting the contrary at the present time after his refusal or failure to avail himself of the several opportunities offered him by the law to establish his claim, if he had any. No conclusion can be drawn from his conduct save that he accepted the legacy upon the understanding and purpose expressed in the will and no conclusion can be drawn from the will except that the legacy was a mere gratuity, in recognition of services rendered the deceased when she was in limited circumstances, and without expectation of payment. As our records show Mrs. Doty was worth \$20,000 at her death, it will therefore be presumed that if she supposed that Dr. Reid had any legal claim against her she would have paid him and it will also be presumed for the same reason that if Dr. Reid had a valid debt against her he would have collected it in her life time. These facts alone, even if she had made no explanation in relation to the bequest to him, are very strong evidence of the non-existence of any legal indebtedness to Dr. Reid and suggest the real motive and intent of the legacy as well as the reason why Dr. Reid never attempted to collect any pretended debt against Mrs. Doty. It was in her power to have exempted this legacy from taxation at his expense by directing that the tax thereon be paid as part of the expenses of administration and not be deducted from the legacy; but she chose to bestow her bounty subject to such conditions as the statute might impose upon it.

It is immaterial whether the law or the testator attaches conditions to testamentary gifts, the legatee cannot take a benefit under the will and refuse the burden imposed on it. By accepting the provisions of the will the appellant has assented not only to the reasons, purposes and objects of Mrs. Doty in making the bequest to him, as expressed in the will, but to the terms and conditions which the law has annexed to it, and has surrendered every right which he may have had or asserted in the courts against her estate, which was inconsistent with the

provisions of the will and the terms and conditions attached to it and forming the consideration and motive of the legacy. The appellant was put to his election, either to establish his claim for professional services, or to accept the bounty which the deceased gave him in recognition of his kindness to her. By neglecting to present any account to the executor, or prove any claim against the estate, and having accepted the gratuity which the deceased provided for him in her will, it was the duty of the executor on its payment to him to deduct therefrom the tax which had been assessed by the surrogate. If he desired to escape the payment of the tax, or was dissatisfied with the amount of the legacy, he should have established his debt if he had any against the estate and had it paid by the executor in the usual manner and let the legacy go to him in the residuary assets.

"The times have been,
That, when the brains were out, the man would die,
And there an end; but now they rise again.
With twenty mortal murders on their crowns,
And push us from our stools."

So in the settlement of estates the legal skeletons of stale claims and outlawed demands stalk forth from their charnel houses and their graves and seek to push from their stools the guests whom the testator has invited to the feast.

This appeal is therefore dismissed, but as the practice in this class of proceedings has not been very clearly settled by the courts, without costs to the appellant.

In the Matter of the Application of EDGAR T. PHELPS for leave to issue executions against the property of ROBERT WALLACE, Deceased.

(Surrogate's Court, St. Lawrence County, Filed January 2, 1894.)

1. EXECUTION—LEAVE TO ISSUE.

An application for leave to issue an execution upon a transcribed justice's judgment, may be made before the expiration of three years after the issuing of letters of administration.

2. SAME.

The better practice, in such case, is to apply first to the County Court, in which all questions concerning the validity of the judgment can be tested.

Swift & Bell, for petitioner; C. A. Boynton, for administratrix.

VANCE, S.—This is an application for leave to issue executions upon two judgments, recovered in justice court, in favor of the petitioner against Robert Wallace, now deceased, as follows:

On December 23, 1886, for \$402.05, a transcript of which was filed with the county clerk the same day and upon which it is claimed fifty dollars was paid December 14, 1888, and the other for \$184.80 May 19, 1891, transcript filed May 21, 1891. Robert Wallace died January 16, 1892, and letters of administration upon his estate were issued by the Surrogate of St. Lawrence county to Maria Wallace, February 5, 1892.

The application is opposed on the ground that under section 1380 of the Code of Civil Procedure the decree sought cannot be granted until three years after the issuing of letters of administration. If the lien of the petitioner's judgments was created as prescribed in section 1251 of the Code, the objection must be sustained.

Section 1380, so far as applicable to this case, reads as follows: "After the expiration of one year from the death of

a party against whom a final judgment for a sum of money or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment debtor was still living, but such an execution shall not be issued unless an order granting leave to issue it is procured from the court from which execution is to be issued, and a decree to the same effect is procured from a surrogate's court of this state which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section 1251 of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent and for that purpose such lien existing at decedent's death, continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll."

It is clearly apparent that the section above cited treats of two classes of judgments. In one class a proceeding such as the one now before this court may be instituted at any time after *one year from the death of the party*, while in the other class the commencement of such proceedings must be deferred until after the expiration of *three years* from the getting of *letters testamentary or of administration* upon the estate of the decedent. The second class includes all judgments where the lien was created as prescribed in section 1251. Turning to that section it reads thus: "Except as otherwise specially prescribed by law, a judgment hereafter rendered, which is docketed in the county clerk's office, as prescribed in this article, binds and is a charge upon for ten years after filing the judgment-roll, and no longer, the real property and chattels real in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years."

The "article" referred to in the section last cited covers

sections 1245 to 1272, both inclusive, of the Code of Civil Procedure. Only sections 1245-6 and 7 relate to the question under consideration.

Section 1245 provides that "each county clerk must keep one or more books in which he must docket, in its regular order, and according to its priority, each judgment which he is required by this article to docket." Section 1246 provides that each clerk, specified in the last section, must, when he files a judgment roll, upon a judgment rendered in a court of which he is clerk, docket the judgment by entering in the proper docket book the particulars therein enumerated. Section 1247 is as follows: "A clerk, with whom a judgment roll is filed, upon a judgment docketed as prescribed in the last section, must furnish, to any person applying therefor and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such a transcript is presented must, upon payment of the fees therefor, immediately file it, and docket the judgment, as prescribed in the last section, in the appropriate docket book kept in his office." The foregoing are the only provisions prescribing the docketing of judgments found in the article of the Code which includes section 1251.

An examination of these sections will convince the careful reader that they relate only to judgments rendered in a court of record. The judgments of the petitioner are not such; each was rendered in a court of the justice of the peace. They were docketed in the county clerk's office not as prescribed in any of the sections above cited, but in accordance with the provisions of section 3017. The lien of the petitioner's judgments not having been created as prescribed in section 1251, the three years limitation of section 1380 is not applicable to them. This conclusion gives meaning and effect to each of the provisions of section 1380. The limitation of one year after the death of a party applies to judgments rendered in courts not of record, transcripts of which have been filed in the office of the county clerk, while the limitation of three years after

issuing letters applies to judgments which were originally rendered in courts of record.

It is strongly urged that the lien of the petitioner's judgments is for ten years after the filing of the transcript, and that they should therefore be included in the second class of judgments mentioned in section 1380. I am not prepared to adopt the proposition that under the provisions of the Code of Civil Procedure the petitioner's judgments are a lien for ten years after the filing of the transcripts thereof in the office of the county clerk. I am aware that there are cases so holding. *Townsend v. Tolhurst*, 10 N. Y. Supp., 378; 32 St. Rep., 21; *Matter of Gates*, 21 N. Y. Supp. 576. These cases are based on the authority of *Waltermire v. Westover*, 14 N. Y., 16. The last named case arose upon a judgment docketed under the provisions of the Revised Statutes, which were that a justice's judgment docketed by a county clerk "shall be a lien on the real estate of the defendant within the county in the same manner and with like effect as if such judgment had been in the Court of Common Pleas." Judge SELDEN, in delivering the opinion of the court, says: "The words, 'in the same manner and with the like effect,' are broad and comprehensive, and seem intended to place judgments in justices' courts when docketed upon the same footing in all respects, as to the lien created, with those of the common pleas." The lien of a judgment of the court of common pleas was by statute declared to exist for ten years. These statutory provisions taken together made it clear that the lien of a justices' judgment docketed in the county clerk's office continued for ten years, and the only question in the case was whether the six years statute of limitations, then existing as to such judgments, deprived the plaintiffs of the right of execution.

The provision of the Revised Statute above quoted was repealed when the Code of Procedure was adopted. The last named act made the statute of limitations as applied to justices' judgments, twenty years, and providing that from the time of filing a transcript thereof in the office of the county

clerk, "the judgment shall be a judgment of the county court." Under that Code the questions now under consideration could not possibly arise. Upon the adoption of the Code of Civil Procedure the provisions of the Code of Procedure were repealed, and the statute of limitations, as applied to justices' judgments, made six years, as under the Revised Statutes. That this limit of six years attaches to such judgments after the filing of the transcripts in the county clerk's office is now settled. *Dieffenbach v. Roch*, 112 N. Y., 621; 21 St. Rep., 570. The provisions of the Code of Civil Procedure concerning the filing of transcripts of such judgments is found in section 3017, is as follows: "The county clerk of the county, in which the judgment was rendered, must, upon the presentation of the transcript and the payment of the fees therefor, endorse thereupon the date of its receipt, file it in his office, and docket the judgment, as at the time of the receipt of the transcript, in the book kept by him for that purpose, as prescribed in article 3 of title 1 of chapter 11 of this act. Thenceforth the judgment is *deemed* a judgment of the county court of that county, and must be enforced accordingly, except," etc. It is very significant that the legislature, in substituting one Code for the other, changed the language "*shall be* a judgment of the county," of the old Code, to that of "*is deemed*," etc., in the new, and that, while as to the statute of limitations it returned to the provisions of the Revised Statutes, it failed to re-enact those provisions which made such docketed judgment a lien for ten years. The phrase "as prescribed by article third," etc., in the section last quoted, brings forward and incorporates into section 3017 the provisions of article 3 of title 1 of chapter 11, as to the keeping of a judgment book and the docketing of judgments therein, but it does not carry back and insert into that article the provisions of section 3017 for the filing of transcripts of justices' judgments in the county clerk's office. The last named provision is not, therefore referred to by section 1251.

If I am correct in my construction of the meaning and extent of section 1251, that it does not include judgments rendered in justices' courts, transcripts of which have been filed in the county clerk's office, there is no legislation, which I can find, which, in direct terms, prescribes the duration of the lien of such docketed judgment, and a lien once established would be perpetual unless extinguished by payment or the statute of limitations.

After a careful study of all the provisions of the Code of Civil Procedure, and of all reported cases bearing in any wise upon the question, I have reached the conclusion that the only effect of filing a transcript of a justice's judgment in the clerk's office is to enlarge the field for its enforcement. It adds nothing to its longevity for any purpose. It ceases to be enforceable in any way in six years after its rendition. This construction removes the anomaly which some of the decisions present of having a judgment, which by operation of the statute of limitation is dead, as a cause of action yet alive so as to be a lien on the real estate of the judgment debtor.

This is in accord with the conclusions of the general term of the New York common pleas in *Herrman v. Stalp*, 24 St. Rep., 40. While it has been held that it is not material to which court application is first made in these cases, I deem it to be the better practice to apply first to the county court in which all questions concerning the validity of the judgment can be tested, and such practice will hereafter be required in this court.

I will, therefore, withhold the granting of the decree asked for until the decision of the county court upon the application made to it for an order granting leave to issue executions on said judgments.

It is, therefore, ordered that this proceeding be adjourned until the 15th day of January, 1894 at 10 A. M., to allow the petitioner opportunity to have the questions here considered submitted to that court.

In the Matter of the Judicial Settlement of the Accounts of
MATTHEW H. ELLIS, as Administrator, etc., of GEORGIANA
HURD, Deceased.

(Surrogate's Court, Kings County, Filed December, 1893.)

SURROGATE'S COURT—REFEREE'S FEES.

The surrogate has power to direct and enforce the payment of referee's fees in his court out of the funds of the estate.

ABBOTT, S.—The executor filed his accounts in this proceeding May 5, 1892. Objections thereto were filed, and a reference was ordered June 27, 1892. There were several hearings before the referee, and about 200 pages of testimony taken. The reference was closed, and the referee prepared his report, which was unsatisfactory to all parties, and no one would take it up. On January 11, 1893, the referee filed his report in this court within sixty days from the final submission of the case. Nearly a year has elapsed since the filing of the report, and no steps have been taken by anyone towards the confirmation or modification of the same, and the fees of the referee remain wholly unpaid. This is an application by the referee for an order taxing his fees and directing the accounting executor to pay the same as taxed. The question whether the surrogate has power to make such an order seems to be entirely novel.

Section 2546 of the Code provides that the surrogate may appoint a referee in certain special proceedings, whose power and compensation (see also section 2566) shall be the same as a referee appointed by the supreme court for the trial of an issue of fact in an action. The fees of a referee appointed under this section, therefore, are limited to those of a referee appointed by the supreme court. It has been held that where a referee appointed by the supreme court is unable to collect his fees, his only remedy is by action. *Geib v. Topping*, 83 N. Y. 46. It is claimed, however, that the rule laid down in *Attorney-General v. Continental Life Insurance Co.*, 93 N. Y., 45-47,

modifies the rule enunciated in *Geib v. Topping, supra*, and should apply to the fees of a referee on an executor's account, as well as those of a referee on a receiver's account, the powers and duties of both officers being quite analogous. The same learned judge wrote the opinions in both the cases quoted above, and I think he intended to make a distinction as to the payment of the fees of a referee dependent upon the subject matter of the reference. An ordinary action in a court of record is a controversy between individuals to adjust their private rights as between themselves. There is no fund in court to be distributed, nor any interest or jurisdiction in the matter except to determine the dispute according to the forms of law, and have judgment recorded. The successful litigant collects, if he can, the damages, costs and disbursements so awarded to him. If he cannot, it is his private misfortune, as to which the court awarding judgment has no responsibility and no concern.

In an accounting proceeding in the surrogate's court the situation, power and duty of the court are quite different. The accounting executor is an officer over whom it has general supervision and control. Code, section 2472, subd. 3. It is his duty as such officer to manage, pay out and distribute the personalty according to the will of the testator and as directed or approved by the court that, by its letters testamentary, has authorized him so to do. For the purpose of such distribution the fund is in court, and there the executor seeks the final approval of his acts, with directions as to the distribution of the funds remaining and his discharge from the responsibility of his office. To ascertain the facts in the matter, the court appoints another as its officer, *i. e.*, a referee, and being furnished with his report, approves or disapproves of the conduct of its accounting officer. Such a distinction as the foregoing must have entered Judge RAPALLO's mind when he said in *Attorney-General v. Continental Life Insurance Co., supra*: "Ordinarily a referee must look for his fees to the party who takes up the report, and not to the adverse party. *Geib v. Topping*, 88 N. Y. 46. In this case the party in whose favor the report was

made being a receiver appointed by the court, whose legal expenses are properly payable out of the fund, the court has power, in the first instance, to order the referee's fees paid directly out of the fund."

I think the analogy between a receiver and an executor or administrator is sufficiently complete to apply the rule last laid down. Both are officers of a court which holds a fund as to which both must account, and from which, before distribution, the proper charges of each must be deducted. An appraiser, like a referee, is appointed by the surrogate's court to aid it in certain directions. Section 2565 provides that his fees shall be taxed by the surrogate and paid by the executor or administrator. I think the same principle applies to the fees of a referee. This is not a question of a disputed claim against an executor, but simply the enforcing by the surrogate of the collection of part of the fees of his court. If the surrogate has the power to appoint a referee it would seem that such power could carry with it the right to direct the compensation. Surrogate Rollins (*Re Kraus*, 4. Dem. 271) says: "If the referee shall see fit to file his report without exacting his fees, provisions may be made in the decree *or order* that may hereafter be entered in this proceeding for the payment of those fees by such of the parties hereto as may be found justly chargeable therefor."

There was a stipulation between the parties entered on the minutes that the referee should be allowed a fair compensation beyond the statutory fees, but the precise rate was not fixed. This stipulation is now repudiated. In such case the court has no power to grant more than the statutory compensation. This sort of practice, however, was aptly characterized by Judge GRAY in *Griggs v. Day*, 135 N. Y. 469, where he says, at page 472 (48 St. Rep. 470): "In the present case the defendants have sought to escape upon a purely technical objection from the effect of a written stipulation, which it was their duty to recognize, and which the promptings of a moral and honorable sense should have impelled them to abide by."

I will tax the referee's fees at ninety-six dollars, and he may

present an order directing the executor to pay them forthwith, and also the fees of the stenographer amounting to \$160.95; in all the sum of \$256.95.

**In the Matter of Proving the Last Will and Testament of JOHN
WHEELER, Deceased.**

(Surrogate's Court, Rensselaer County, Filed October, 1893.)

1. EVIDENCE—DECLARATIONS.

All acts or declarations, forming part of the act or transaction to be proved so as to explain or qualify it, are admissible when such transaction or act forms the fact in issue or is deemed relevant thereto.

2. WILL—TESTAMENTARY CAPACITY.

No presumption of want of testamentary capacity arises from old age alone, nor from enfeebled condition of body or mind.

3. SAME—UNDUE INFLUENCE.

Where it has been once proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is upon the party who alleges it.

4. SAME.

Where the alleged testator is quite old and somewhat weakened, by reason of age and infirmities, both in body and mind, the burden is shifted upon the party in whose interest an important change in the will is made.

5. SAME.

The presumption, which the law raises under such circumstances, is one of fact and not of law, and may be repelled.

APPLICATION for the probate of the will of John Wheeler, deceased.

King & Speck, for proponent; Cornelius Snyder and John P. Albertson (William J. R. Roche, of counsel), for contestants.

LANSING, S.—John Wheeler, late of the town of Sandlake, in this county, died March 3, 1891, aged 86 years. He left surviving him no widow, child or descendant, brothers or sisters, but nephews and nieces and grand nephews and nieces, some twenty in number, his only heirs at law and next of kin. His wife died some fifteen years before him and after the death of his wife and down to the time of his own death, he lived on his farm in Sandlake in the family of his nephew, George P. Gardner. The deceased had taken his nephew into his family upon the death of his mother, Wheeler's sister, when he was an infant only a few weeks old, and they lived together upon the farm for a period of more than fifty years.

The farm upon which he lived consisted of about 150 acres, the value of which is variously estimated from \$5,000 to \$8,000. He was also the owner of a small amount of personal property of the value of about \$1,500.

The instrument propounded for probate as his last will was executed September 22, 1890, about six months before his death. The will was prepared by his neighbor and friend, Andrew J. Smart, who also attended its execution. It was witnessed by two persons residing in the neighborhood, who had known the testator for many years. By this will the bulk of the testator's property, which consisted of his farm, stock and farm equipments, was devised to his nephew, George P. Gardner, subject to the payment of \$1,500. Legacies of \$50 each were given to some ten of his nephews, nieces, grand-nephews and grand-nieces, and two legacies of \$100 each to the wife and daughter of George P. Gardner. It appeared that Mr. Smart drew and attended the execution of a prior will, in 1885 or 1886, which was destroyed at the direction of the testator after the execution of the will of September 22, 1890. All the legatees mentioned in the earlier will are also legatees in the will in question except Col. Silas Wheeler and John A. Coons, both of whom died after the making of the former will, and except, also, Hiram Taylor, a grand-nephew of the deceased, who was given \$1,200 under the will of 1885, and nothing under the

present will. No legacies were given to the wife and daughter of George P. Gardner in the first will.

By the former will George P. Gardner and John A. Coons, since deceased, were named as residuary legatees and devisees, but in the last will George P. Gardner remained as the sole residuary legatee and devisee.

By the former will George P. Gardner was given the farm and its equipments in the precise terms employed in present will, except that in former will he took the farm subject to the payment of \$2,500 instead of \$1,500, as provided in the last will. A legacy of \$100 was given to each of the four children of the testator's grand-nephew, Hiram Taylor, and a like sum was given to each of testator's nephews and nieces, Col. S. Wheeler, Michael Wheeler, John C. Wheeler, Alvina Goewey and Zilpha Fielding, and to his grand-nieces, Cora Metcalf and Teletta Upham; each of these legacies was reduced to \$50 under the last will.

Andrew J. Smart was named as executor in each will, but filed his renunciation after presenting the latter instrument for probate.

None of the contestants, except Hiram Taylor, a grand-nephew; John C. Wheeler, nephew, and Zilpha Fielding and Lucy Metcalf, nieces, are mentioned as legatees in the present will or in the will of 1885. The three last named nephews and nieces receive \$50 less in the present will than in the will of 1885.

The substantial difference between the will of 1885 and the present will, so far as the contestants are concerned, is the omission in the latter instrument of a legacy of \$1,200 to Hiram Taylor contained in the will of 1885.

The probate of the will is challenged by the contestants upon the ground, first, that the testator did not possess testamentary capacity; second, that undue influence was exercised over the testator by George P. Gardner in procuring the present will.

I shall not attempt an extended analysis of the evidence, which is very voluminous, upon the question of testamentary

capacity of the alleged testator. It is sufficient to say, after a very careful examination of the evidence, I am satisfied, notwithstanding the age of the testator and his considerable impairment in physical and mental vigor that he possessed sufficient mind and memory to make the will in question.

. It is well settled in this State that "no presumption of testamentary incapacity arises from old age alone. Nor can incapacity to make a will be inferred from enfeebled condition of mind or body." *Horn v. Pullman*, 72 N. Y. 269; *Van Guysling v. Van Kuren*, 35 id. 70; *Bleecker v. Lynch*, 1 Brad. 458, 472; *Van Alst v. Hunter*, 5 Johns. Ch. 148.

In the latter case the Chancellor says: "The control which the law still gives to a man over the disposition of his property, is one of the most efficient means which he has in protracted life to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been produced by fraudulent arts and contains those very dispositions which the circumstances and the situation and the course of natural affection dictated."

The true test of testamentary capacity is, did the testator have sufficient intelligence to comprehend his property, his relations to those who are or may be the objects of his bounty and the scope and meaning of the provisions of his will? If so, he was in law of sound mind and memory. *Horn v. Pullman*, *supra*; *Delafield v. Parish*, 25 N. Y. 10.

"It is not necessary that he should be able to collect all these in one review. If he understands in detail all that he is about and chooses with understanding and reason between one disposition and another, it is sufficient for the making of the will." *Wilson v. Mitchell*, 101 Penn. St. 492, 502; *Schouler on Wills*, section 83.

"Nor is it necessary that the particular will and its provisions should have originated with the testator, provided he understands and adopts and sanctions whatever disposition was proposed and embodied in the instrument." *Tunison v. Tunison*, 4 Brad. 138; *Schouler on Wills*, section 233.

Let us consider the testimony in the light of these rules. It appears that although the testator's health was quite feeble, yet he was able to be about the house when the will was made and during the same fall and after the will was executed, was engaged in light work about the farm. He dug potatoes, husked corn and busied himself about such farm work as an industrious old man might do.

Considerable testimony was given by the contestants tending to show that the deceased was very feeble physically during the last years of his life; that he was afflicted with a hacking cough, had occasional lapses of memory, that he wandered off and was lost, on one occasion (the same year the will was executed), and was found in the field upon his farm, where he had fallen upon the ground and remained unable to rise. That upon that and other occasions he appeared dazed and confused and could not walk without assistance, and on occasions complained of his head and said he could not remember as well as he used to. The family physician, Dr. Nichols also testified that in his judgment his mind was impaired; that in his opinion the deceased was not of sound mind on the 22d day of September, 1891, but the doctor on further examination stated that he could not express such an opinion disconnected from knowledge which he gained in attending the deceased professionally. This testimony is, therefore, inadmissible, and was excluded. But if retained sufficient facts were not stated by him to warrant me in accepting this opinion even in connection with the contestants' other evidence against a great body of testimony from the acquaintances, neighbors and friends of deceased, who testified from personal intercourse with him during the latter years of his life, touching his health, intelligence, physical and mental vigor, as evidenced by his appearance, conduct and conversation, to the effect that not only about the time of the making of the will, but for a considerable period prior and subsequent thereto, the testator possessed a large measure of intelligence and mental vigor for a man of his years; that he was affected with no delusions, that

his conduct was natural and his conversation rational and intelligent, compelling the conclusion that testator was possessed of a sound and disposing mind and memory when the will was executed on the 22d of September, 1891. I have not overlooked the fact that Mr. Smart, the draughtsman of the will and a very intelligent and conscientious witness, testified that "the testator's mind was not on that occasion sprightly, but was dull and heavy, did not work well, his memory very much impaired." Yet he testified that he read the will to Mr. Wheeler twice, first the draft or memorandum, then the prepared instrument (indeed, the prepared instrument itself was read to him twice, once on each of two different days before its execution), and he states, "I think he understood it (the will) as I read it; he probably understood the paragraphs as I read them;" he adds, "but possibly it slipped his mind as I read the next one," a surmise I hardly think justified by his description of what occurred there. For Smart states that Mr. Wheeler answered all the questions which he asked him in regard to the changes which he desired to make in the former will without requiring any assistance, and further, that before he (Smart) commenced to prepare the memorandum for the present will, the deceased stated to him his reasons for changing the former will, and the changes were made in accordance with the reasons so stated. And, finally, as to whether the testator understood the changes made in the former will and the provisions of the present will, the witness testified: "It looked as though he (testator) had made up his mind, before he commenced, to cut them (the legacies) down one-half, except one, and that was to be stricken out." And this is substantially all he did by the latter will. I am quite sure the testator knew what he intended to do in disposing of his property by his will and that he carried out his intention.

Upon the whole, then, I conclude, in the light of all the testimony and the rules of law applicable thereto, that the testator was of sound mind and memory at the time of the execution of the will.

But another and more serious question is presented by the second defense, namely, that the will was induced by undue influence exercised by George P. Gardner the principal beneficiary. For the discussion of this question, it is important, preliminarily, to determine the admissibility of certain testimony which was offered upon the trial, decision upon which was reserved. It is charged that George P. Gardner, the principal beneficiary under the will, improperly influenced the mind of the testator to omit the legacy of \$1,200 from the present will which the testator had given in the former will to Hiram Taylor, a grand-nephew of the testator, who had lived with him a great many years. For the purpose of proving this charge, it was material and proper for the contestants to show not only interest and opportunity, but a disposition on the part of Gardner to produce the result. For the purpose of showing this disposition it was proven that Gardner personally procured the attendance of the draughtsman to draw the will. In this connection the contestants offered to show further that on the way over to Wheeler's house a distance of a mile or two Gardner said to the draughtsman that the old gentleman (Mr. Wheeler) wanted alterations made in the will and wished him (Mr. Smart) to come down and make them; that Gardner further said "that he was surprised that Mr. Wheeler should have given his property or any of it to a drunkard, and he named as the drunkard Hiram Taylor;" and further said "that the old gentleman had given away more property than he had" and "had he known that there was any such intention to give his property to Hiram Taylor, he would have had a deed of the farm before that."

The introduction of this testimony was strenuously resisted upon the ground that the declarations or admissions of one of several legatees are not admissible to impeach the validity of a will, where such admissions may affect others not in privity with the party. In support of this position they cite: *Matter of the Will of Baird*, 47 Hun, 77, 14 St. Rep. 172; *Brush v. Holland*, 3 Brad. 240-242; *Shailer v. Bumstead*, 99 Mass. 112, 124.

Undoubtedly such declarations are inadmissible as independent testimony to show what a legatee or devisee had done or intended to do, to improperly influence a testamentary disposition of property. But it seems to me that for the purpose of showing motive or disposition to do so, the statement made to the draughtsman by the devisee in connection with this act of securing the attendance of the draughtsman, was part of the *res gestae* and is competent. It might serve to characterize the act of the devisee in procuring the draughtsman, which was proven to show a disposition to do the act charged. The declaration seems clearly within the rule that all acts or declarations forming part of the act or transaction to be proved so as to explain or qualify it, are admissible when such transaction or act form the fact in issue or is deemed relevant thereto. Stevens Digest Law of Ev. page 6; *Waldele v. N. Y. C. & H. R. R.* 95 N. Y. 274; *People v. Davis*, 56 N. Y. 95, 102; *Eighmy v. People*, 79 N. Y. 546.

Surrogate Bradford, in the case of *Brush v. Holland*, *supra*, while holding such declarations competent, insists that they should have little weight as reflecting the mind of the person making them, since they may spring from a boastful spirit. But it is not necessary to determine the weight of this testimony here.

Having decided to admit this evidence, it is important to consider its effect in determining the burden of proof. Ordinarily when it has been well proven that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is upon the party who alleges it. *Tyler v. Gardiner*, 35 N. Y. 559; *Baldwin v. Parker*, 99 Mass 79, 85. *In re Will of Martin*, 98 N. Y. 196; *Matter of Green*, 67 Hun, 531, 48 St. Rep. 450.

But it seems to me, where, as in this case, interest and opportunity are shown; and testimony tending to show a disposition upon the part of the person charged with undue influence has been introduced, and it further appears that the party charged

had peculiar opportunity of influencing the mind of the alleged testator by reason of his being a member of his family, dependent upon him for the supply of his wants and the comforts of a home; and further that the alleged testator was quite old and somewhat weakened, by reason of age and infirmities, both in body and mind, that the burden is shifted upon the party in whose interest an important change in a will is made; and that he should be called upon to produce satisfactory evidence that the provisions made in his own favor in the later will, following the change in the former will, was the result of the free act and will of the testator, entirely uninfluenced by any device or improper influence upon his part.

The presumption which the law raises under such circumstances is one of fact and not of law and may be repelled. *Marx v. McGlynn*, 88 N. Y. 371.

The proponent in this case insists that he has assumed the burden and furnished ample evidence repelling any and every imputation of fraud or undue influence on his part, and shown that the instrument propounded was the free act and will of the testator. In support of this contention he insists that the testimony shows clearly and satisfactorily, first, that the will was executed in due form with all the solemnities required by the statute, by a person of sound mind; that it was made after careful explanation and consideration of every paragraph of the will; that several hours were spent in its preparation by the testator and the draughtsman upon two separate days; that it was carefully read to him twice, upon different days, before its execution, and received his approval; that the history of the drafting and the execution of the will show that no undue influence was exerted by anyone at that time; in addition thereto the draughtsman testified, "I think when I arrived there he (testator) knew what he was going to do." Second, that the will in question was drawn along the lines of the former will prepared five or six years before by the same draughtsman, without the knowledge of Gardner, when the testator had the aid of an old and tried friend, and was engaged several hours

in its preparation and framed it with full knowledge of, and after due consideration, of the claims of his various relatives upon his bounty. That said will contained substantially the same provisions in favor of George P. Gardner as the present will. That by the former will George P. Gardner was given the farm, the stock and its equipments, charged with the payment of legacies to the amount of \$2,500. That at that time the farm was of the probable value of \$10,000 or \$12,000. That at the time of the death of the testator the farm was estimated to be worth only from \$5,000 to \$8,000 showing an estimated shrinkage in value from one-third to one-half. Third, that at the time the last will was drawn, the testator stated to Mr. Smart, the draughtsman, the reasons he desired to change his will. The reasons stated were that "he did not want his property drunk up in rum;" that he did not want to give money to dead men, and that he had given away more than he had. That it appeared that the will of 1885 was changed only so as to conform to the instructions which the testator gave to the draughtsman. That the changes made were, first, to eliminate the names of those deceased since the former will; second, to lessen the amounts given to the ten or twelve legatees in the former will from \$100 to fifty dollars, only three of whom are contestants of the present will. That the remaining contestants, except Hiram Taylor, received nothing under either the former or later will; third, that the testator believed Hiram Taylor to be a drunkard, and for that reason omitted him in the new will. That it was of him the testator spoke when he said, "I don't want my property drunk up in rum." Fourth, that George P. Gardner was the child by adoption and the object of affection of the testator; that he was reared in his family, given his family name, which he retained until he was twenty-one years of age (when it was changed by reason of some difficulty about voting). That George married, brought his wife to his home, and after the death of the testator's wife, twelve or fifteen years prior to his own, the testator became a member of Gardner's family on the farm, ate at his table and resided with

him until his death, a period of more than fifty years. That the mutually acknowledged relation of parent and child had existed between them during this entire time. That the testator had an abiding affection for George, which among other evidences was manifested by the fact that although Hiram Taylor (who was also reared in the family of the deceased and remained with him from the time he was three years of age until he was about twenty-three) was in his youthful days much more tractable, industrious and respectful than George in his treatment of the testator, yet Hiram was permitted to leave when he married, while George was retained and continued with the testator until his death. That although a considerable amount of testimony was given showing that George at times was disrespectful to, and at times chided, the testator, using language more forcible than polite, yet it appeared that upon most occasions it arose from solicitude on the part of George for the health or safety of the testator. And it is insisted that the deceased never received any intentionally harsh or unkind treatment from Gardner or his family and never even complained of any; that on the contrary the evidence shows that his treatment by Gardner, and especially by Gardner's family, was very kind and considerate and was so regarded by the deceased. Fifth, that considering the relations of these parties, there is nothing in the change made in Gardner's favor by the later will, charging the farm with the payment of \$1,500 instead of \$2,500 or the legacy of \$100 each to his wife and daughter, which may not reasonably be presumed to have resulted from motives of gratitude and affection or been prompted (in view of the change of the value of the testator's estate) by his desire of carrying out his original intent of giving Gardner the farm without burdensome charges. And finally, that the deceased stated repeatedly during his life, when in full health and strength, that he regarded George P. Gardner as his son and expected his property to go to him, and complained that his other relations had shown him little or no attention and said they would get but little from him.

To this contention the contestants reply that, assuming that

the testator did intend to make George P. Gardner his principal beneficiary and give him the bulk of his property, yet it is apparent that George P. Gardner did exercise his influence to exclude Hiram Taylor from any share in the testator's property, and that he substantially received the benefit of it for himself and his family and they insist that the very fact that the testator was found uttering the same reasons for changing his will as those which were given by George P. Gardner to the draughtsman when he was conveying him to the testator's house to make the change furnishes cogent evidence that this particular act was inspired by George P. Gardner, and they insist that his will dominated the will of this feeble old man and produced the change in the will against him.

This contention has much force, and deserves and has received careful attention. But it seems to me that it is met by this consideration. If it was not true, as stated and believed by the testator, that Hiram Taylor was a drunkard and that "his money would be likely to be drunk up in rum," it was in the power of the contestants to show that fact. They failed to do so, although ample opportunity was afforded upon the trial and even after the trial, a proposition on the part of the surrogate to open the case and take further testimony upon that point, if either party desired, was declined. It is clear that the deceased believed the charge; and acting upon that belief it certainly was not an unreasonable act to exclude Hiram Taylor from any share or portion of his property.

Although I have held that the burden of proof was upon proponent to repel the presumption of undue influence arising from Gardner's declarations and his somewhat peculiar relations to the deceased in this case, yet the proponent having shown that the testator held and gave a sufficient reason for the change in his will, it seems to me that it then devolved upon the contestants, in order to fasten their charge of undue influence upon George P. Gardner, to show not only that the charge was untrue, but that George P. Gardner, knowing it to be un-

true, or not believing or having reason to believe it to be true, induced the testator to believe it to be true, and thus produced the result in question.

George P. Gardner could not testify under the law as to what he did or did not tell the testator upon the subject, but it is very obvious that the testator, who was upon good terms with his neighbors and in constant intercourse with them and with the men who were employed upon the farm—of whom there were several every year—had ample opportunity to learn of the character and habits of Hiram Taylor, who resided in the same neighborhood, from others beside George P. Gardner. So that no inference is necessarily drawn from the fact that Gardner and the deceased held and expressed the same opinion concerning the habits and character of Taylor, that the testator received his information upon the subject, whether true or false, from Gardner.

The law applicable to this branch of the case seems to me to be exceedingly well stated in Schouler on Wills, section 238:

“If the disposition appears on the whole a just and reasonable one, or even such as the testator would naturally have made under all the circumstances with a due perception of the act engaged in, the property possessed and the fit claimants to his bounty, little remains to urge against the will unless it can be positively shown that the will notwithstanding was not that of the testator.”

And I venture to add the following—that where a satisfactory reason is given by a testator for a change in his will, the law will not presume that the change was produced by undue influence upon the part of another, even though such person be solely benefited thereby, but there must be absolute proof to establish the charge.

In conclusion I am satisfied that the deceased intended that the property which he had accumulated by so many years of patient toil, industry and economy, should be received and enjoyed by his foster son, who was the principal beneficiary in his former will, drawn beyond question when he was competent

to make one. That his legacies to his other relatives, except Hiram Taylor, were regarded by him as of comparatively slight importance, and their reduction in amount under the circumstances of this case, does not warrant the presumption of fraud or improper influence. That the legacy to Hiram Taylor was omitted for the reason stated by testator, and there is no evidence that the charge was untrue or that it emanated from George P. Gardner. And finally, I am satisfied that to set aside this will and scatter this property among the twenty odd nephews, nieces, grand-nephews and grand-nieces of the testator, many of whom were not named in either of his wills, and to deprive George P. Gardner of the estate which the testator had in both wills planned to give him, would be a gross wrong both upon the living and upon the dead.

Let proper findings be made, and a decree entered accordingly.

In the Matter of BENJAMIN COOPER, Deceased.

(Surrogate's Court, Cattaraugus County, Filed January, 1894.)

1. EXECUTORS, ETC.—DISPUTED CLAIM.

The surrogate, upon an accounting by the personal representative of a deceased executor, may determine the validity of a claim of such deceased executor against the estate of testator.

2. CONTRACT—IMPLIED PROMISE.

A promise to pay for services will be implied, unless a presumption arises from the relation of the parties that they were rendered without any expectation of compensation.

3. TRUST—SPECIFIC PURPOSE.

Delivery of money to a person, to be applied to specific purposes, to which he assents, creates a valid trust.

PROCEEDINGS for a judicial settlement of the accounts of the executors.

Thrasher & Leonard, for Ezra Cooper, the surviving executor; J. M. Congdon, for administrators of Henry H. Atwell, the deceased executor; J. J. Inman and W. S. Thrasher, special guardians, *pro se*.

DAVIE, S.—Benjamin Cooper died at the town of Perrysburgh on the 14th day of February, 1892, at the age of 88 years, leaving him surviving no widow, children or descendants. His will, bearing date July 9, 1891, was admitted to probate May 2, 1892, and letters testamentary thereupon issued to Ezra Cooper and Henry H. Atwell, the executors therein named, who continued to manage and control the estate,, acting together, until the death of the executor, Atwell, on the 19th day of September, 1892. Shortly after Atwell's death his widow and son were appointed administrators of his estate. The surviving executor and the administrators of the estate of the deceased executor present their petition for judicial settlement herein. At the time of the death of the testator, Atwell was indebted unto him upon a promissory note, dated June 5, 1891, for the sum of \$300 and interest, due one year after date, for which it is claimed that the representatives of the Atwell estate should account. On the contrary it is alleged that during the last year of testator's life Atwell rendered services for him greatly exceeding in value the amount of such note, and for which the administrators present a claim, and seek to have the same adjudicated upon this accounting. On the return of the citation the parties opposed to the allowance of the claim moved that this proceeding, in so far as it related to such claim,, be dismissed upon the ground that the Surrogate's court had no jurisdiction to try the disputed question of fact involved in the determination of the claim, and that it was not a personal claim, within the general scope and view of section 2739 of the Code. The motion was denied, but if it should be determined upon a careful examination that the Surrogate's Court had no jurisdiction, then the proceedings should be to that extent dismissed, and the parties left to their remedy by action or by a reference under

the statute to determine the controversy between the two estates. The section of the Code referred to provides that—

“Upon a judicial settlement of the account of an executor or administrator he may prove any debt owing to him by the decedent; where a contest arises between the accounting party and any of the other parties respecting any property alleged to belong to the estate, but to which the accounting party lays claim, or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the Surrogate’s Court.” Code, section 2339; Laws 1893, c. 686, section 2731.

Had Atwell survived, no doubt would have existed in regard to the authority of the Surrogate’s Court upon this accounting to have determined the extent of his indebtedness to the estate or the indebtedness of the estate to him. Does the fact of his death, and that he is represented upon this accounting by his personal representatives, deprive the Surrogate’s Court of jurisdiction to determine precisely the same questions? No authorities are cited bearing directly upon this question, but it has been held that the Surrogate’s Court has jurisdiction upon judicial settlement to hear and determine all claims in which an executor is interested, and the circumstance that he is interested jointly with others in the demand does not affect the authority to adjudicate with regard to it, *Estate of Eisner*, 5 Dem. 383; that a surrogate has authority to determine whether a claim against an executor is discharged by will, *Stevens v. Stevens*, 2 Redf. 265; that, where an executor claims the right to retain out of the assets of the estate a certain sum of money as belonging or due to him, the surrogate has jurisdiction, whether such right depends upon legal or equitable principles, *Boughton v. Flint*, 74 N. Y. 476; that the executor acquired an additional interest in the claim sought to be established after he became executor does not affect the jurisdiction, *Shakespeare v. Markham*, 72 N. Y. 400; that the surrogate has jurisdiction to pass upon and settle claims held by the executor

or administrator in a representative capacity against the estate as well as one held by him individually, and the fact that others were joined as administrators of one estate, while he was sole administrator of the other, was immaterial, *Neilley v. Neilley*, 89 N. Y. 352. While none of these cases are directly in point, they evidence a design on the part of the courts to so construe and apply this section 2739 of the Code as to clothe the surrogate with ample authority on judicial settlement to determine all property rights between administrator or executor and the estate which he represents and which are necessary to be determined in order to secure a full adjustment of all matters connected with the trust. Upon qualifying and assuming control of the assets of the estate as executor, Atwell incurred the obligation of properly administering upon and duly accounting for such assets, and this obligation is not affected by the fact of his death. The statute declares that the amount of his indebtedness to the estate in an asset to be accounted for as so much money in his hands (2 Rev. St. 84, section 13; *Baucus v. Stover*, 89 N. Y. 1), but the extent of such indebtedness depends upon the validity of his personal claim; hence, it becomes indispensable to pass upon such claim in order to determine whether the representatives of Atwell's estate should account for the amount of the note as assets. The conclusion, therefore, seems inevitable that the provisions of section 2739 of the Code are sufficiently comprehensive to confer jurisdiction in a case of this character, and that the claim should not be dismissed for lack of jurisdiction, but disposed of upon its merits.

The evidence clearly shown that during the last year of testator's life Atwell rendered important and necessary services for him. About the 1st of July, 1891, testator deemed his condition such as to require an attendant at night. Accordingly Atwell began staying with, and attending upon him, during the night time, and continued doing so until about the 10th day of September, when he began staying with testator both day and night; and from that time to testator's death Atwell was in attendance upon him substantially all the time, and during

that period Atwell had, to a great extent, the responsibility of administering medicines to testator; slept in the same room with him, attended his calls, waited upon, nursed, and cared for him. The services were to some extent of an unpleasant and disagreeable nature. The testator was afflicted with a urinary trouble, rendering the use of a catheter frequently necessary, which operation was usually performed by Atwell. While the evidence clearly discloses the meritorious character of the services, it is not so easy to discover therefrom a satisfactory and legitimate measure of the value of such services. Mrs. Waterman testified that she had been a nurse for 30 or 40 years, and that she knew the value of the services rendered by Atwell and that they were worth from five to six dollars per day; but the cross examination of this witness established her utter incompetency to speak as to the question of value. The evidence of the witness Vosburgh was in much the same situation. While he testified that the services were worth five dollars per day, it appeared that his opportunities for becoming familiar with the value of that kind of services were confined to a single transaction, where he cared for, boarded, and nursed a sick man for three weeks and received five dollars for so doing. The attending physician was unable to give any opinion whatever as to the value of the services. Dr. Rugg, who knew in a general way the condition of the testator, testified that if the testator was entirely helpless, requiring attention all the time, the services were worth from four dollars to five dollars per day; but assuming that from the middle of July to the middle of September Atwell merely slept there nights, called occasionally to wait upon the testator, and during the last five months had assistance in caring for him, and that the testator was not confined to his bed until within a short time before his death, but was up and dressed, such services would be worth from two dollars to two dollars and fifty cents per day. The latter assumption is much more in conformity with the actual facts. The evidence as to testator's condition, and what Atwell actually did, under Dr. Rugg's estimate of the value of the services, would not to any extent justify or sustain a finding that such services were worth to exceed

two dollars and fifty cents per day while Atwell was in attendance both day and night, and one-half that sum when there nights only. Testator was not entirely helpless, and did not require attention all the time. He was up and dressed in the day time, and able to go to the table for his meals until shortly before his death. This makes the total value of the services \$472.50. But it is urged upon the part of the contestants that, whatever the value of the services, they were rendered under such circumstances, and the relations existing between Atwell and the testator were of such a character, that the legal presumption is that they were rendered gratuitously. Ordinarily, where one receives the beneficial services of another, the law implies a promise to pay what such services are reasonably worth; but such presumption may be entirely overcome by the circumstances of a particular case. The legal presumption of an obligation to pay is very weak when the services rendered are of such a character that, from the relations existing between the parties, they evidently were prompted by motives of affection and reciprocal obligations. If the circumstances are such as to lead to the conclusion that the services were rendered gratuitously the law will not imply an obligation to pay. It has been distinctly held that, however valuable the services, one cannot render them with a tacit understanding that no pecuniary charge is to be made therefor, and afterwards recover upon a quantum meruit. *Moore v. Moore*, 3 Abb. Dec. 303; *Williams v. Hutchinson*, 3 N. Y. 312; *Ross v. Ross*, 6 Hun, 182. While no doubt exists in regard to this legal proposition, the evidence by no means justifies its application to the case at bar. It is true that the relations between Atwell and the testator were, and for many years had been, of a friendly character. Testator was accustomed to call upon Atwell, from time to time, for advice and assistance and occasionally spoke of him as his boy; yet the evidence does not disclose such a state of reciprocal obligations between the parties as to render it presumable that either Atwell or testator understood that these services were being rendered without expectation of pecuniary

compensation. The statements and declarations of testator imply a contrary intent. While the amount of compensation was not fixed by the agreement of the parties, the evidence shows that testator expected to pay what such services were reasonably worth. Shortly after the commencement of the services, testator stated to Atwell, in the presence of Mrs. Waterman, that he had a \$1,000 mortgage and a \$500 note, and that he was going to fix it so that Atwell could collect them; and the \$1,000 he was going to give to Atwell and the \$500 to Mrs. Waterman, because of the services they had rendered and the kindness they had shown him. He repeated this statement to Atwell on several occasions while the services were being rendered. On another occasion testator said to Atwell that he wanted to and was going to pay him well, and he thought it would be right that he should allow the \$1,000 for his services. The entire evidence in the case is susceptible of no other construction than that it was the mutual expectation that Atwell should receive a reasonable compensation. This case seems to come fairly within the scope of *Markey v. Brewster*, 10 Hun, 16.

There is, however, another feature of this case requiring careful consideration. It appears that during the time Atwell was caring for the testator he delivered to Atwell the sum of \$1,500 in money, and the circumstances attending such delivery are disclosed by the cross-examination of the witness, Mrs. Waterman:

“Q. Did you hear a conversation between Atwell and Mr. Cooper, and what Mr. Cooper told Atwell to do with this money? A. He told him to take eight hundred dollars—five hundred dollars to give to Mrs. Abbott, one hundred dollars to her mother, two hundred dollars to be sent to Washington Territory to her sister and brother. Q. What about Mrs. Lincoln? A. Was to have one hundred dollars. Q. Anything said about what was to be done with the balance of the money? A. He told him. Q. What did he say? A. He told him to keep the remainder for my use. Q. You heard Mr. Cooper tell him that? A. I did. Q. What did Mr. Atwell say? A. He said he would do it; they should be done according to the request.”

Very soon after the receipt of the money Atwell paid to the various persons designated by the testator their respective amounts, and the balance he had in his possession at the time of testator's death. It is claimed on part of the surviving executor that such transaction merely constituted Atwell an agent to disburse this money for the testator, and that such agency was terminated by testator's death; that the portion of this fund which remained in Atwell's hands at the death of testator constitutes a part of his estate, and that Atwell's representatives should account for the same. On the contrary, it is asserted that this transaction, construed in the light of all the attendant circumstances, constituted a valid trust, and that the title to such fund vested in Atwell as trustee, with Mrs. Waterman as *cestui que trust*, and that Atwell's representatives are under no obligations to account to any one but her therefor. It is undoubtedly true as a legal proposition that if it was the intention of the testator to constitute a mere naked deposit of this money in the hands of Atwell, thereby creating only an oral agency, coupled with no interest on Atwell's part, such agency was revocable at the pleasure of testator, and upon his death ceased by operation of law (Story, Ag. 463-488); but if it was the design of testator to part with the title to and all control over this fund, to place it absolutely and unqualifiedly in the hands of Atwell, to use for the benefit of Mrs. Waterman, then the transaction was not in any manner affected by testator's death. It will be observed that there was no legal impediment to the creation of a trust of the character claimed to exist in this case. A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law (Gilman v. McArdle, 99 N. Y. 451); and in order to constitute a trust in respect to money or personal estate, no formal or written agreement is necessary (Day v. Roth, 18 N. Y. 448; Gilman v. McArdle, 99 N. Y. 451). In construing this transaction it is competent and proper to take into consideration the attendant facts and circumstances evidencing the motive and intent of the testator. Day v. Roth, 18 N. Y. 448. If the circumstances clearly indicate an

intention to create such a trust, it is sufficient. *Minchin v. Merrill*, 2 Edw. Ch. 333. In seeking to discover the intent of the testator, it will be necessary to refer to the relations existing between the parties. It appears from the evidence that Mrs. Waterman began residing in the family of the testator before the death of his wife, which occurred in February, 1887, and from that time continued to reside with the testator in the capacity of housekeeper until his death. She assisted to some extent in nursing and caring for testator, who frequently expressed his appreciation of her kindness, and a design to compensate her therefor. After the making of his will, and evidently about the time of delivering the money in question to Atwell, testator expressed an intent to give to Mrs. Waterman the proceeds of a \$500 note, assigning as his reason for so doing that she had rendered services and been kind to him. This note, however, was never transferred to Mrs. Waterman. Moreover, at the time of delivering the money to Atwell, testator expressed no intention of retaining any control or jurisdiction over it. He did not retain the right to direct at what time or in what manner it should be used for Mrs. Waterman, and it does not appear that he ever made any suggestion in relation to it after delivering it to Atwell. If the testator had, at the time in question, delivered the money to Mrs. Waterman herself, telling her to keep it for her use, it would have constituted a valid gift *inter vivos*, and transferred the absolute title to Mrs. Waterman, and neither testator nor his personal representatives could have recovered any part of it. Has not the title passed just as absolutely by a delivery of the fund to Atwell for the use of Mrs. Waterman? In the case of *Gilman v. Ardle*, above cited, it was shown that Mrs. Gilman placed in the custody of the defendant about \$2,000, and directed him to use the money for the support and maintenance of herself and husband as long as they lived, and after the death of the survivor to pay their funeral expenses, and erect for them suitable monuments, and expend the residue in masses for the repose of the souls of herself and husband. It was claimed by the plaintiff in that case that the transaction cre-

ated a mere agency, revocable at the pleasure of Mrs. Gilman, and that no title to the fund passed to the defendant, and that, in consequence, the agency was revoked by her death; but the Court of Appeals held that such was not the case; that a valid trust was thereby created, saying:

“Where money is paid by A to B on the promise of B to invest or employ it in a definite, specified and lawful manner, a valid contract is made; and if there is an ascertained beneficiary interested in the performance of the agreement, he can, after the death of A, enforce it as a trust.”

In the case at bar, testator, after having frequently acknowledged the obligation he was under to Mrs. Waterman, and evidently desiring to make some certain and definite arrangement for her compensation, delivered this \$600 to Atwell, directing him to use it for her. Atwell accepted the money, agreeing, unequivocally, to use the fund for that express purpose. Under the authority above cited, it is difficult to conceive of any reason why Atwell was not absolutely obliged to account to Mrs. Waterman for the entire sum. The cases are numerous illustrative of the character of transactions which the courts have adjusted to constitute valid trusts. Where S. deposited money in trust for M. and K., distant relatives, who were ignorant of it, S. retaining the bank book and drawing one year's interest, it was held that a valid trust was created. *Martin v. Funk*, 75 N. Y. 134. Where C. F. deposited money in the bank to her own credit, “in trust for C. F. M.,” it was held to be the money of C. F. M. *Millspaugh v. Putnam*, 16 Abb. Pr. 380. A. delivered a package to B., containing money, a bank book and a memorandum stating where he desired to be buried, and how the balance of his property was to be distributed. Held to be a valid trust. *Pierce v. Bank*, 129 Mass. 425. Where one took a bank book at the direction of his aunt, who said: “Now, keep this, and if anything happens to me, bury me decently and put a headstone over me, and anything that is left is yours”—it was held that a trust was created. *Curtis v. Bank*, 77 Me. 151. Also. in a case where a testator transferred certain bank shares

to himself as trustee for his daughter, she being ignorant of the transaction, and he taking the dividends. *Cummings v. Bramhall*, 120 Mass. 552. Also where one delivered a bank book with an assignment of the deposit to E. on the agreement that E. should pay such sums to her as she might want from time to time during her life, and the balance to her son. *Davis v. Ney*, 125 Mass. 590. In the case of *Mabie v. Bailey*, 95 N. Y. 206, the testator made a deposit in a savings bank in his own name as trustee for the plaintiff, took a pass book in which the account was so entered, exhibited the pass book to plaintiff's mother with other pass books containing entries of a similar character in favor of herself and other children, and when asked why he did not let them have the money then, said it would do them more good thereafter, and in subsequent conversations these deposits were recognized by the testator as a provision for the family. It was held that the evidence clearly showed an intent on part of the testator to create a trust for the benefit of the plaintiff.

It is, however, urged on part of the contestants that, assuming this transaction to constitute a valid trust, there is another reason why the representatives of the Atwell estate should account for at least a part of this fund. It appears from the evidence that after the death of the testator, and on or about the 17th of May, 1892, Mrs. Waterman and Mr. Atwell had an adjustment of their affairs, and Atwell then paid over to her the sum of \$500, taking her receipt therefor, which stated that such payment was in full satisfaction of all claims which Mrs. Waterman had against him, and in full settlement for all sums which Atwell held for her, in trust or otherwise, and in particular from Benjamin Cooper. It does not appear from any other source just how much of this fund Atwell had in fact paid over to Mrs. Waterman, and it is claimed that it inferentially appears from the receipt that he settled with her in full for this \$300, thereby making a gain for himself in contravention of the well-established principle that trustees are not permitted to retain any profits or advantage to themselves through their dealings with

the trust fund. Citing *Dunl. Paley* Ag. 51; *Davoue v. Fanning*, 2 Johns. Ch. 252; *McMurray v. McMurray*, 66 N. Y. 175. But if we are right in the conclusion already reached, that the title to this fund passed absolutely from the testator, then Atwell was accountable only to the *cestui que trust* for the manner in which he administered the trust, and not to any extent to the representatives of the testator. The conclusion reached, therefore, is that the representatives of the estate of Atwell are entitled to recover from the estate of testator the difference between the amount of the note above referred to and the value of the services rendered by Atwell to the testator as above determined. A decree will be entered accordingly.

In the Matter of WILLIAMS.

(*Surrogate's Court, Cattaraugus County, Filed January, 1894.*)

APPEAL—SURROGATE—CASE.

Under Supreme Court Rule 32, a surrogate may permit service of a case and exceptions after expiration of the time therefor.

Motion for leave to serve a case and exceptions.

Henry R. Curtis (C. D. Van Aernam and Alfred Spring, of counsel), for the motion; C. Z. Lincoln, opposed.

DAVIE, S.—On the 17th day of April, 1893, a decree was made directing the mortgaging of the real estate of which the intestate died seized for the payment of his debts, which decree also established a personal claim in favor of the administrator against the estate. On the 6th day of June, 1893, a copy of such decree, with a notice of entry properly indorsed on the back thereof, was personally served upon the contestants' attorney. On the 4th day of December, 1893, contestants served a proposed case containing exceptions upon the attorney for the administrator,

he being the petitioner in the proceedings for the disposal of the real estate for payment of debts of intestate. The petitioner's attorney immediately returned such proposed case and exceptions, with his reasons for so doing indorsed upon the back thereof, viz., that the same was served too late, that no appeal was pending in said matter, and that such proposed case was not in conformity with the requirements of section 796 of the Code, not being legibly written. The first question to be determined upon this motion is whether or not an appeal is, in fact, pending; for, if no such appeal has been taken, and the time for appealing fully expired, no reason exists for granting the relief sought. It appears from the moving papers herein that after the entry of the decree negotiations for settlement were entered into between the parties, and, in consequence, certain correspondence ensued between the attorneys regarding an extension of time for service of notice of appeal and a case herein. On the 12th day of August, 1893, a notice of appeal was personally served upon the petitioner's attorney, which was immediately returned with the indorsement that the same was served too late. A motion was thereupon made for the purpose of determining whether such service was seasonably made or not. All the correspondence between the parties bearing upon the question of extension of time was then before the court, and it was thereupon determined that the proper construction to be placed upon such correspondence was that, under all the attendant facts and circumstances, it did, in effect, constitute a valid extension of time for taking an appeal and serving a case for a period of 60 days, which had not yet elapsed when such notice of appeal was served; and an order bearing date on the 20th day of October, 1893, was thereupon made and entered, reciting to some extent the history of the proceedings, and providing "that said appeal be allowed; that said Curtis re-serve said notice of appeal upon said Lincoln within twenty days after date of this order, and that said Lincoln accept and retain said notice." On the 15th day of November, 1893, contestants' attorney remailed the notice of appeal to petitioner's attorney, who at once returned it,

with the reasons indorsed that it was served too late, that it was not properly served, and that it did not appear therefrom who the parties to such appeal were. It is entirely apparent that the service of November 15, 1893, was not sufficient to perfect an appeal in the first instance. There is no authority for taking an appeal from an order or decree of a Surrogate's Court by service of notice of appeal by mail. Code, section 2574.. If no appeal was, in fact, then pending, it was of little consequence in what manner the original notice of appeal was returned to the petitioner's attorney. Of course, no court has the authority to extend the time for taking an appeal, or to allow an appeal to be taken after expiration of time (*id.* sec. 784; *Clapp v. Hawley*, 97 N. Y. 610); but it was entirely competent for the parties to stipulate an extension of time or to waive any statutory provision made for their benefit (*Ex parte Crosby*, 8 Cow. 119; *Buell v. Trustees of Lockport*, 3 N. Y. 197; *Root v. Wagner*, 30 N. Y. 9-17; *Baker v. Braman*, 6 Hill, 47); and the only question involved in the former motion was as to whether or not the parties had in effect stipulated such extension, and the decision of such motion was a judicial determination that the acts and correspondence of the attorneys constituted such extension, and a notice of appeal having been served within such extended time, petitioner's attorney was not justified in refusing to accept the same. The case and exceptions, however, were concededly served too late, and it is now urged in opposition to this motion that the Surrogate's Court possesses no authority to relieve the contestants in this particular, or to permit the service of a case after the expiration of the time therefor, whatever the excuse for such default, or however meritorious the application. If such is the case, the practice in Surrogates' Courts is sadly defective; and, if there is at present no law sanctioning the granting of such relief in a proper case, a little law should be immediately made remedying such defect. But a little observation will show that parties are not remediless in such a case. Very general authority is given to courts of record in the exercise of their discretion to relieve a party from the consequences of an omission

to do an act necessary to protect his rights, upon good cause shown (Code, sec. 783), and under the authority of this section courts very generally grant the right to serve a case after the expiration of the time therefor, upon proper application being made, and upon such terms as seems just. This section is not in terms made applicable to Surrogates' Courts (*id.* sec. 3347, subd. 4); but, if the authority to grant relief in cases of this kind is not specifically conferred upon Surrogates' Courts by virtue of the section of the Code cited, and is not an inherent power necessarily incident to its general authority and jurisdiction, specific authority seems to exist from the provision of Supreme Court Rule 32. This rule limits the time in which to serve a case, where an appeal is taken from an order or decree of a Surrogate's Court, to 10 days after service of such decree or order and notice of entry thereof, but the rule further provides that "the surrogate, on appeal from his court, may, by order, allow further time for the doing of any acts above provided to be done on such appeal;" and it cannot with any degree of consistency be urged that the power to extend the time in which to serve a case, granted by this rule, must be exercised before the expiration of the time for so doing. The only reasonable construction to be placed upon the provision of rule 32, above quoted, in view of the general mode of procedure in other courts and of the objects to be attained, viz.: a careful protection and supervision of the rights of all the parties, is that the Surrogate's Court is clothed with ample authority thereby to permit a party, at any time after an appeal is taken, to serve a case, if the application is seasonably made therefor, and good reason shown. An order should be accordingly made permitting the contestants, on or before the 10th day of February, 1894, to serve their proposed case, and to fully perfect their appeal by filing and serving the requisite undertaking on appeal and upon paying \$10 costs of opposing this motion to the petitioner.

Ordered accordingly.

In the Matter of EDWARD C. BEIRNE, as Guardian, etc.

(*Surrogate's Court, Orange County, Filed January, 1894.*)

GUARDIAN AND WARD—GIFT.

Where the intention of the guardian to make certain gifts to his ward has been fully consummated by a complete delivery, he cannot upon his accounting be credited for them as for moneys expended for the benefit of the ward.

Proceedings for an accounting by a guardian.

C. E. Cuddeback, for minor; John J. Beattie, for guardian.

BOLEMAN, S.—Edward C. Beirne was appointed general guardian of the minor September 8, 1891. Mr. Beirne is a brother of the minor's mother. In the month of November, 1876, he purchased five shares of the stock of the Orange County Building & Loan Association, in his name as guardian of the said Mulligan, and, at various times thereafter, and prior to November, 1888, he made divers other payments required by the rules of the association (when the same were not made by the parents of the minor) upon said stock, which, with the amount paid at the time of purchasing the stock, amounted, in all, to the sum of \$279.27. When the stock matured, he caused himself to be legally appointed the minor's guardian, and received, as such guardian, \$1,000 from the association, the then value of said shares of stock. This sum the guardian invested upon bond and mortgage, which he still holds. Upon this accounting Beirne seeks to credit himself with the \$279.27, paid by him upon the building and loan association stock, to which objection is made on behalf of Mulligan; it being claimed that such payments were intended to be gifts to him. It was evident, upon the hearing, that the feelings of the parties towards each other have changed from what they formerly were; and it is now necessary to determine the purpose, and the legal effect, of the acts of the said Beirne in connection with said stock. The pay-

ments were voluntarily made, with the knowledge that the minor had no other property. When made, they became, not deposits, but an interest in the stock of the association, which, by his own act, were made to belong, upon the books of the association, to him, as guardian of his nephew. He thus parted with the dominion over the property represented by the stock, except in the capacity of guardian. No entry, in the nature of an account, was made of the payments, and they were not made for the purpose of protecting property belonging to the minor, unless this stock is to be considered the property of the minor, and, being so considered, it could not, at the same time, be the property of Mr. Beirne; nor were they made for necessities, required for the maintenance of the minor. If Mr. Beirne had died during the minority of his nephew, leaving the stock, and the payments made by him, in the association as they stood, before maturity, I think no one could have successfully questioned the ownership of the minor. These facts, supported by the further fact that Mr. Beirne himself drew the fund from the association, and invested the whole of it in a mortgage for the minor, clearly indicate to my mind an intention on his part, at the time of making the payments, to make a gift to his nephew, a purpose which he cannot now change, such intention having been fully consummated by a complete delivery, whereby he divested himself of all title thereto, and, being gifts, he cannot now be credited for them upon this accounting, as for moneys expended for the benefit of the minor.

Decree to be entered in accordance with foregoing opinion.

In the Matter of the Will of JOSEPH F. JOHNSON, Deceased.

(Surrogate's Court, County of New York, Filed February, 1894.)

1. WILL—EXECUTION.

A will may be proved by the evidence other than the testimony of the subscribing witnesses.

2. SAME—COMPETENCY.

A mind partially clouded by drink may execute a valid will.

3. SAME.

The fact that the testator had an epileptic fit does not raise a presumption of disability after he has recovered from the attack.

4. SAME—UNDUE INFLUENCE.

The act of a party addicted to intemperance, in disposing of his property, will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, through kind offices springing from attachment or affection.

Application for the probate of a will.

Henry Kropf, for executor; Christion G. Moritz (Henry Hoyt, of counsel), for Eliza J. Johnson; Fernando Solinger and Charles H. Beckett, for contestants.

FITZGERALD, S.—Objections were filed by the father of decedent to the admission to probate of the paper propounded as his will. The first question that arises affects the validity of its execution. The subscribing witnesses, Hollings and Kelly, prove compliance with all the formalities required by the statute except that Hollings does not recollect a declaration by the testator that the paper was his will, or a request for him to sign it as a witness. He admits, however, that he was requested to sign by the proponent, Mr. Drake, who superintended the execution of the paper. It is evident that Hollings did not regard the event as of sufficient importance to charge his memory with all the details connected with the execution. He did not recall the fact that on the same occasion he had signed another will—that of the testator's sister—and his memory was at fault in respect to the time of the execution. His recollection was that it took place between nine and ten o'clock in the morning, whereas, it was not until late in the afternoon. Kelly's testimony is sought to be discredited, because inconsistent with statements in a certain affidavit that he made long after he had signed the will as a subscribing witness, and also because of contradictions in the testimony he gave upon collateral matters.

To provide against the infirmities of memory and the possible hostility of subscribing witnesses, the law, by a long line of decisions, has established that the execution of a will may be proved by other evidence. This principle is recognized in section 2620 of the Code of Civil Procedure. In the Matter of Cottrell (95 N. Y. 329), both subscribing witnesses testified, not only that the formalities requisite for the due execution of a will were not complied with, but they denied that either was present at the time of the execution of the will, or signed the attestation clause. Yet the court held, on proof of the circumstances surrounding the preparation of the instrument, the genuineness of the testator's signature, and the recitals in an attestation clause in his own handwriting, that the surrogate has sufficient facts to justify him in finding a valid execution. In the case at bar, there is not only a full attestation clause, but the testimony of the witness Drake, a reputable man, engaged in an extensive real estate business in this city, who, though not an attorney, has had experience in the drawing of wills and legal papers pertaining to real estate transactions, leaves no doubt that all the acts necessary for the valid execution of a will were performed, even without the confirmatory testimony of Miss Battjer and Freibly, who were present when the will was executed. I could not hold the contrary except on the assumption that the will was the result of a conspiracy, to support which five witnesses had been guilty of perjury.

The execution of the will having been established, the issues as to testatomentary capacity and undue influence will be considered.

Joseph F. Johnson was still a young man at his death. He had been addicted to the excessive use of intoxicating liquors for many years; had come to be a drunkard, and had suffered from delirium tremens, and some months after the execution of the will he was an inmate of the Inebriate Home. His mental powers were probably never robust, and had been weakened by his excesses.

Drunkenness may so becloud the mind as to make it incapable

of doing an intelligent act. But the disability ends when the exciting cause is removed. In this it differs from insanity, which, once shown to exist, is presumed to continue until there is proof that intelligence and reason have asserted themselves. A drunkard may execute a valid instrument within a day, or even less, from a time when it would be conceded that he was incapable. In each case the question to be determined is, whether at the time he was sober, or if not, whether his mind was so affected by drink that he was not sufficient master of himself to give expression to his real wishes. One may be so indifferent to his interests that he will neglect his estate, or, if not indifferent, his habits of intemperance may disable him from caring for it, and even make it necessary for a committee to be appointed that his estate be not wasted. It does not follow that he does not know that he has an estate which he can bestow, of what it consists, or that he has not a preference as to who shall receive it after his death. A clear mind is needed to conduct a complicated business transaction. A mind partially clouded by drink may execute a valid will. The proofs are positive that on the 23rd day of October, 1891, when the will in question was prepared and executed, Johnson was sober. Making due allowances for the defective memory of witnesses and their possible disposition, by reason of interest or prejudice, to vary their narratives from strict truth, the weight of evidence is that he had then been sober for some days, if not weeks. He was ill on that day and also on the day previous. If Johnson's mind was so weakened that he could not conserve his estate, yet, if he could recollect its nature and extent, and those for whom, following the usual impulses of men, he would provide, he had the capacity to make a valid testament. It is not questioned that on October 23, 1891, he knew that there were two houses on Avenue C, and certain property at Sugarloaf, that had come from his mother's family, and that it was within his power, as incident to his ownership thereof, to give it to his father, to his sister, or both, or to a stranger.

It is not necessary to refer to the many cases in this State in

which the wills have been sustained, and which are far more suggestive of testamentary incapacity by reason of drunkenness of the testators than the one under consideration.

I will only cite the leading case of *Peck v. Carey*, 27 N. Y. 9, and the recent decision in the *Matter of William A. Reed*, 2 Connolly, 403.

The fact that Johnson had an epileptic fit does not raise a presumption of disability after he had recovered from the attack. Contestants claim that it occurred on the morning of the day the will was signed. If so, I am satisfied from the evidence that it did not affect his capacity in the afternoon. The opinion expressed by Dr. Lines, who was called as an expert, but who never had seen Johnson, and that of Hollings, the subscribing witness, that the testator was incompetent to make a will, are outweighed by others, who proved acts and words that showed his capacity.

Nor is the allegation of undue influence sustained by the proof. On the morning of the day on which he signed the paper Johnson sent for Mr. Drake, not once, but twice, and, after his arrival in response to the second call, he stated to Mr. Drake his wishes in respect to the disposition of the property, and asked that a deed should be prepared by which his estate should go to his sister. After discussion he acquiesced in the suggestion that a will be also prepared. Late in the afternoon Mr. Drake returned with the papers. Both were read to Johnson, who stated them to be in accordance with his wishes. On the same occasion a reciprocal will and a reciprocal deed were executed by his sister to him.

Certain previous declarations are shown to have been made by Johnson that his estate was to go to his father. If he had executed a will containing that provision, it was his right, even capriciously, to revoke it. But his declarations never took the form of a will or other legal paper. They probably expressed his feelings at the time they were made, but had no further significance. There is abundant proof of other declarations by him showing indifference, if not hostile feelings, for his father.

He stated that his father had committed a criminal assault on his sister in her childhood. Such an act would have furnished a reasonable motive for the father's disinheritance, as would the belief of the testator in the statement he had made, and this irrespective of its falsity, provided that such belief was not an irrational one or the result of an insane delusion. No evidence has been presented controverting the statement, or showing that it was the product of unreason or of such a delusion.

On the question of undue influence exercised on a drunkard in the procurement of a will, the rule laid down in *Gardner v. Gardner*, 22 Wend. 526, is still the law. It was held there that "the act of a party addicted to intemperance, in disposing of his property, will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, where the influence arises from kind offices springing from attachment or affection, and that to vitiate the act the influence must be shown to have arisen from threats, force or coercion destroying free agency, and the boon to have been obtained by such coercion or by importunity that could not be resisted producing compliance for the sake of peace." In *Williams' Will*, 19 N. Y. Supp. 778, 46 St. Rep. 791, the General Term in the third department held that the fact that the will disinherited kindred was not alone evidence of undue influence, nor the fact that the memorandum for the will was prepared by the person who was to be largely benefited thereunder, and who was active in procuring its execution. Nor was the fact that the will was not in accordance with the testator's previously expressed intentions, although it may have an important bearing in connection with other facts; but, without such facts of a pertinent and forcible character, a change in purpose in making a testamentary disposition would not invalidate the will.

Much of the testimony adduced on both sides on the trial refers to matters more or less remote from the day of the execution of the will, and was of such a character as to justify the suspicion that the question of Johnson's mental soundness on that day was not free from doubt, but it did disprove the statements of other

witnesses showing that at the time of the execution of the will testator was of sound and disposing mind. The conveyances and reconveyances and the mortgaging of the property, the acceptance by Johnson of eight dollars a week—less than half the income of his share of the property—and afterwards a pittance of thirty cents a day out of the income when Mrs. Reilly had, under such anomalous circumstances, become possessed of the legal title to the real estate, the continuance without protest for years after he had attained majority of a guardianship begun when he was a child, and other facts proven, show a weakness of mind, but are not inconsistent with testamentary capacity. They suggest a suspicion of undue influence. They do not prove its exercise and under all the circumstances of the case I do not believe it was exercised. A few hours after the testator signed the paper he spoke with satisfaction of the disposition he had made of his estate. Subsequently he expressed the same satisfaction. Later he asked if the will had been recorded, supposing that such an act was proper and necessary to give it effect. He lived for more than a year after its execution, during which time no expression of a desire to change it is shown. I am satisfied that the paper expressed the deliberately formed wishes of a capable testator.

It may be admitted to probate.

IN the Matter of McLAREN'S ESTATE.

(Surrogate's Court, New York County, Filed, January, 1894.)

1. EXECUTORS, ETC.—COMMISSIONS.

In case of an equitable conversion of realty, where the estate is held by the executors unconverted, they are not entitled to commissions on the principal.

2. SAME.

The value of the real estate, in such case, may be considered in determining the commissions to which they are entitled on the income.

Proceedings for the judicial settlement of the accounts of the executors.

Estes, Barnard & Tiffany, for executors; P. H. Vernon, for legatees.

FITZGERALD, S.—An equitable conversion of the realty has been effected by the power of sale given by the will to the executors. The estate, however, is held by the executors as such, and the real estate being, as yet, unconverted, they are not entitled to commissions on the principal thereof. The value of the real estate, however, can be taken into consideration in ascertaining whether the value of the estate of decedent was \$100,000 in excess of debts, for the purpose of determining the commissions to which the executors are entitled on income. The decree should provide for the retention of the estate by the executors, upon the trust in the will. There is insufficient evidence before the court upon which to decide the question as to the value of the real estate unsold, and I have referred the matter.

Ordered accordingly.

In the Matter of MILLWARD'S ESTATE.

(Surrogate's Court, Westchester County, Filed January, 1894.)

1. TAX—TRANSFER—APPRAISEMENT.

In making appraisement of estate subject to the transfer tax, debts, funeral, and administration expenses are not to be deducted.

2. SAME—SURROGATE'S VALUATION.

The surrogate, in fixing such value, may deduct the debts owing by decedent from the value of the estate.

3. SAME—INDETERMINATE BEQUEST.

A bequest to the widow for life or until remarriage, cannot be appraised until the termination of such estate.

Appeal by the executor from the decree fixing the transfer tax.

George B. Bonney, for appellants; D. Verplanck, assistant district attorney, for respondents.

COFFIN, S.—The appraiser was entirely right in declining to hear evidence in regard to the debts of the deceased, the funeral expenses, and expenses of administration. The Court of Appeals held in *Re Swift*, 137 N. Y. 77-87, 50 St. Rep. 81, which arose under the act of 1887, that “manifestly, under the law, that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose.” This supports the view taken on the subject by this court in *Re Ludlow*, 4 Misc. Rep. 594, under the act of 1892. The two actions on this point are substantially alike. This court, however, is asked to deduct the tax on the sum of the debts, funeral expenses, commissions of the executors, and the expenses, aggregating about \$26,700, exclusive of commissions, which were not estimated, but inclusive of a claim of a physician for \$2,629, now alleged to be in dispute, and also the sum of \$2,500 as the estimated expenses of administration. The amount in value of the estate or property to be taxed should be fixed with mathematical certainty, and not by mere estimate or approximation. This is easily done at once on general and specific legacies, but on those embraced in a residuary clause such amount subject to the tax, if any, cannot be fixed until the accounting shall have been had, if we are allowed to deduct for debts, funeral expenses, and expenses of administration, for the physician’s bill is stated to be in dispute; and hence, how much it may be reduced or affected by the result, and the cost of litigation, if any, or how it may affect the estimated expenses of administration, cannot now be known. Whether any deduction, such as is sought here, can even then be made, is involved in such doubt. The value of the property or estate to be appraised is defined by the twenty-

second section of the act of 1892 to be the property or estate of the testator passing or transferred, and not as the property or interest therein passing or transferred to individual legatees, etc. Hence the appraiser must make his report of the whole value of each legacy or distributive share at the point of transfer, without making any deduction whatever; and the surrogate must then fix the tax upon the value of the "estate" so reported which each legatee is to pay, and give notice to each legatee. The legatees, "if dissatisfied with the appraisement or assessment and determination of tax, may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the ground upon which the appeal is taken." If it turn out on the appeal that no error was made in the appraiser's valuation, or in the fixing, assessing, or determination of the tax, then it would seem that the appeal would fail. It cannot be discovered that the act anywhere expressly authorizes the surrogate to deduct from the appraised value any debts, funeral expenses, commissions of executors, or expenses of administration; and it is, therefore, fairly questionable whether the legatees do not take *cum onere*, as the tax is not put upon what the legatees do not get, but upon the value of the estate at the point or period of the transfer, which is the date of the death of the testator. It is believed that courts should seek for a solution of this doubt in favor of legatees in other provisions of the act, that unjust results in some cases (insolvent estates, for instance) may be avoided. Accordingly, we find in section 6 that if any debts shall be proven against the estate of the decedent after the payment of a legacy or distributive share from which the tax has been deducted or paid, and the person to whom the legacy has been paid shall be required to refund a *pro rata* share, the executor, etc., shall refund to him an equitable proportion of the tax. While this is not the case, it may fairly be inferred that the legislative intention was that debts owing by decedent should be deducted from the value of the estate so left by him. In

general, this would affect the residuum in testamentary cases. Again, section 10 provides that the surrogate "shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction." This is a question so arising, and he may, in an accounting proceeding, allow debts admitted or established and paid to be credited and deducted from the *corpus* of the estate, or, if not paid, to direct their payment by the decree; and, of course, has jurisdiction to allow commissions, funeral expenses, and expenses of administration, but has, in general, no power to hear and determine a disputed claim. It seems, therefore, that he may, at the proper time, allow the several items in question when ascertained. In this case, however, as they are not known, they must abide the accounting as above stated.

But there is another ground, not stated in the notice of appeal, which renders the appraisal and fixing of the tax at present impossible. Where an estate for life is given, with remainder over, it is an easy matter for the superintendent of insurance to fix the value of the life estate. But here the widow is given the use of the whole for life, and, in case of her remarriage, then the use of one-half only. While we have an established method for ascertaining the value of a life estate of a widow, based upon an arbitrary rule as to probable time of death, there is lacking any such rule to enable us to approximate the period when, if at all, she may remarry. That defies all calculations. Hence the value of her estate, or of the remainder, cannot now be ascertained for the purpose of the assessment of the tax. That cannot be done until her death or marriage. The decree is therefore set aside and vacated.

In re FORBES' WILL.

(Surrogate's Court, Cortland County, Filed July 31, 1893.)

WILL—REVOCATION.

When it appears that a will offered for probate was revoked by a second will, the mere fact that the testator destroyed the subsequent will, without more, does not revive the former will, as it is provided by the Revised Statutes that the destruction, cancellation or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive the first will, or unless, after such destruction, cancelling or revocation, the testator shall duly republish his first will (3 Rev. St. [Birdseye's Ed.] p. 3345, sec. 53).

Probate of will of Charles A. Forbes, deceased. Denied.

R. T. Wright, for William A. Bean, executor and proponent; Kellogg & Van Hoesen, for contestant; Henry A. Dickinson, special guardian.

EGGLESTON, S.—The alleged will of Charles A. Forbes, deceased, offered for probate in the Surrogate's Court of Cortland County, bears date on the 1st day of September, 1883. Under this will, William A. Bean, the petitioner, was named as executor. The will appears to have been executed in compliance with the statutory requirements sufficient to admit the same to probate. Upon the return to the citation issued, Pauline B. Forbes, the widow of testator, and Annis R. Forbes and Mabel Forbes, daughters, by their special guardian, interposed objections to the probate of the will upon the following grounds: First. Incompetency of testator to make a will. Second. The will offered for probate is not the last will and testament of Charles A. Forbes. Third. The same was procured to be made by fraud and undue influence. Fourth. That the writing offered for probate was duly revoked by the said Charles A. Forbes in his lifetime, in manner and form prescribed by the statutes of the State for the revocation of such instruments, and that the

writing was revoked by the due execution and publication of a subsequent will, in manner and form prescribed by law, and by destroying the said alleged last will and testament in the manner and form prescribed by law, for the purpose and with the intent of revoking the same. Upon the hearing, the only ground urged against the probate of the will, based upon the objections filed, was that of the testator having made a will subsequent to the one which is offered for probate, and in and by which later will the will of September 1, 1883, was duly revoked.

The facts, as stated in the record of the case, present a strange state of circumstances, and should be carefully considered in order to arrive at a just conclusion as to whether the will offered for probate has been revoked, and whether it is the last will and testament of the deceased. Upon the question as to whether or not there was a subsequent will made revoking the will sought to be probated, Mrs. Sophia Bean, who resided in Homer, and was an aunt of the testator, testifies that, upon an occasion when she was in Cortland, the testator handed to her a will for safe-keeping, and upon that occasion he told her that he had made two wills, one before this one; that this occurrence was after the death of the testator's father, and when the testator brought the will to her, he came out of some office in Cortland, but whether or not it was the surrogate's office she cannot tell. She also says that she never saw but the one will which he handed to her, and that she did not read the will, nor know what its contents were, though she had had some talk with him about one clause in the will, the one providing that the wife should be cut off as a legatee in case of her remarrying. She further testifies that the will was in an envelope at the time, and that she took it home with her, and kept it in a drawer. She thinks the time was in the fall of the year. That she kept the will for several years thereafter until it was sent for, when she sent it to Charles, at Cincinnati, by mail. The witness further states that before she sent the will to Charles, she gave it to William Bean, who took it to B. T. Wright, an attorney-at-law at Cortland, and, in pursuance of some instructions received from him, she took the will

to Elliot Stone, a justice of the peace in the village of Homer, and procured him to make a copy of the will; that the copy which was made was compared by the witness and the wife of William Bean, and was a correct copy; and that she safely kept the copy until about the time that the will of 1883 was offered for probate, when she took the copy and delivered it to, or procured it to be delivered to, Mr. Wright. The will was sent for by Charles, and the copy of the same made during a contest over the probate of the will of one Fred Forbes, a brother of Charles, in which contest William A. Bean, the petitioner herein, was executor and proponent, and Charles was contestant, Mr. Wright acting as one of the attorneys for Bean. By the evidence of Mr. Stone, it appears that he copied the will for Mrs. Bean, and he states he copied it correctly, and that it is a correct copy of the original will and the whole of it; that it is his impression that the original will was in the handwriting of Judge Knox, though he does not distinctly remember. Mr. Benjamin, an attorney-at-law, residing at Cincinnati, N. Y., and one of the attorneys for Charles in the contest of the will of his brother, testifies that he received from Mrs. Bean a will of Charles Forbes, and that it was sent in response to a request by letter that he had mailed to Mrs. Bean, and that he gave the will to Charles Forbes either upon the day that he received it or in a day or two. He further states that he is very sure that the will was in the handwriting of Judge Knox, and that the signature to the same was in the handwriting of Charles. To Mr. Benjamin, Charles stated at the time of receiving the will that he would destroy it, since which time it does not appear that the will has been seen. There is some slight difference in the evidence of Mrs. Bean and Mr. Benjamin as to the sending and receiving of the will, but it is almost immaterial, and shows that one or the other of the persons is mistaken as to the exact facts of sending the will in question. That such will was drawn is further substantiated by the evidence of Judge Knox, who testifies that he drew the will of 1883. He states that he thinks that he drew a will subsequently to the one of 1883 for Mr. Forbes, and finds an entry upon his

cash book under the date of October 1, 1884, as follows: "Received from Charles A. Forbes, for drawing will, etc., \$2.00." At that time Judge Knox was the surrogate of Cortland County. The two subscribing witnesses to the alleged will of 1884, Mr. Suggett and Mr. Stone, testified to the fact that they at about that time were witnesses to the execution of the will of Charles A. Forbes, and, while their recollection is somewhat indistinct as to the details of the matter, yet the evidence given by them is sufficient to make it definite and certain that a will was executed by the deceased at that time. It will be borne in mind that the will was drawn by Judge Knox, the then surrogate of the county, and was witnessed by Mr. Suggett, an attorney having a somewhat extensive knowledge of the drawing of wills, and well understanding what was necessary to be done in the proper execution of the same, and also witnessed by Mr. Stone, who was then clerk of the Surrogate's Court, well acquainted with the statutory requirements necessary to insure a valid execution of a will; in fact, all of said persons being well calculated to perform and have performed all of the statutory requirements necessary in the due and valid execution of a will. That such a will was executed is made quite clear by the evidence of Mr. Wright, who says that Mr. Bean brought to him the original will, and he, with Judge Duell, his associate counsel, examined it and advised the making of a copy of it before delivering it over to Charles. It is his impression that it was dated October 1, 1884, was signed by Charles Forbes, also signed by John W. Suggett and F. E. Stone as subscribing witnesses, and was drawn upon a printed blank. Further than that, the copy of the will made by Mr. Stone produced bears date at the same time as of the drawing of the will by Judge Knox, as appears from the entry upon his cash book, and the names of the subscribing witnesses are the same persons as were witnesses to the will of 1884. So, from the evidence in this case, one can but reach the irresistible conclusion that the deceased did on the 1st day of October, 1884, duly make and execute his last will and testament, of which the copy offered in evidence is a correct copy.

In the will of 1884, which is declared to be the last will and testament of Charles A. Forbes, deceased, is a clause revoking all former wills made by the deceased. The custody of the will of 1883, from the time of the making and execution of the same up to the time it was offered for probate, is not satisfactorily accounted for. By the testimony of Mr. Wright, the attorney for the executor, it appears in some way, which is not explained by the evidence, that the will came into his possession. When or how he received it, or by whom it was delivered to him, he does not know. In fact, he did not know that he had it in his possession until, casually looking over other papers, he found the proposed will in an envelope, marked, "Copy Chas. Forbes' will, to keep;" and it was a matter of surprise to him that he should find an original will of Charles Forbes in his possession. He remembered the fact that the copy of a will was left with him, which is the copy that is produced in evidence as a copy of the will of 1884. The finding of the will offered for probate in the office of Mr. Wright is a strange circumstance (I do not speak of this as a criticism in any way), when viewed in the light of other facts appearing from the evidence in this case. A protracted contest was for several years carried on over the will of Fred Forbes, who was a brother of Charles Forbes. In that proceeding Mr. Bean, who was named as executor in the will of Fred Forbes, proposed the will for probate, and objection to the probate was interposed by Charles. That contest has been carried on for several years, and is still in the courts upon appeal. In that contest Mr. Wright was the attorney for the executor and against Charles Forbes. During that controversy and upon the trial, it appearing that a will had been made by Charles in which he had named Mr. Bean as executor, he was told openly in court by his counsel that he had better procure that will and destroy it. It would be a strange fact, indeed, if, after all of the feeling of bitterness naturally engendered between parties in a protracted litigation—and I think this was no exception—Charles should desire to retain Mr. Bean as the executor of his will, and also knowingly permit the will to remain in the keep-

ing and custody of the attorney who had been strenuously opposing him in the contest and hostile to his interests. Another fact which gives support to the revocation of the will of 1883, and possibly to the destruction of the will of 1884, if that question were in the case, is that, at the time the wills of 1883 and 1884 were made, Sarah A. Forbes was the wife of Charles Forbes, and at that time he had only one child, by the name of Annis Forbes. Subsequent to the making of the will of 1884, another child had been born, and, prior to the death of Charles, his wife had died, and he had again married, the name of his present wife being Pauline Forbes, who is one of the contestants in this proceeding. So that the situation of his affairs at the time of his death, especially in respect to the rights of those who were objects of his bounty, was quite different from what it was at the time when he made either of the wills in question. I am satisfied in this case that the deceased made and executed the will of 1884, and that later, when the same was sent for by Mr. Benjamin, it was so sent for at the request of Charles for the purpose of destroying the same. He had been advised by his counsel to destroy it, and stated to them that he would do so. Since the death of the deceased, the will of 1884 has not been found, though the evidence shows that a diligent search has been made to find the will.

Having reached the conclusion that the testator duly made, executed and published his last will and testament on the 1st day of October, 1884, of which will the copy offered in evidence is a true and correct copy, the only remaining question to be determined is, does the will of 1884 revoke the will of 1883? It is distinctly stated in the will of 1884 that all former wills made by the testator are revoked. By statute it is provided as follows: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required to be executed." 3 Rev. St. (Birdseye's Ed.) p. 3343, sec. 42.

We have, then, proof of the execution of a will by the testator

upon the 1st day of September, 1883, and also proof of the making and execution of a subsequent will upon the 1st day of October, 1884, which subsequent will was executed with the prescribed formalities as required by law, declaring in express terms in the instrument itself that all former wills are revoked by the testator. None of the exceptions referred to in the statute appear in this case. The fact that the subsequent will is not found after the death of the testator when proper search has been made for the same does not afford any ground or reason why the former will should be revived, or why it should be admitted to probate. Such a will, so revoked, is completely out of existence, has no life, and is dead to all purposes. It requires a resurrection by republication, executed with all of the solemnity and exactness required by law to first bring it into existence. Then, again, the will, not having been found after the death of the testator, in the light of the attending circumstances, leads me to believe that it was intentionally destroyed by the testator. It has been recently held that, where a will is not found after the death of a person, it is presumptive evidence sufficient to establish *prima facie* that the testator destroyed it "*animo revocandi*." *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. Rep. 110; *In re Marsh*, 45 Hun, 107; *In re Philp's Will* (Sup.), 19 N. Y. Supp. 13. The will of 1884 not having been found after the death of the testator, fortified by the fact that the wife, one of the legatees under both wills, had died; that Mabel Forbes, a daughter, was born after 1884, and was not a legatee under either will; that Pauline Forbes, the second wife, was in no way mentioned and provided for in the will—and by the further fact that the person to whom was intrusted the management of his estate after his death was one who had been in controversy with him for a period of years, raises a presumption sufficient to establish *prima facie* that the testator destroyed the will of 1884 purposely, and without any intention of reviving the will of 1883.

We have, then, these facts established from the evidence: The making and the execution of the will in 1883; the making and

execution of a subsequent will in 1884, declaring in that will that all former wills made by the testator were revoked; and the fact, *prima facie*, that the testator destroyed the will made by him in 1884. "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to his first will, or unless, after such destruction, canceling, or revocation, he shall duly republish his first will." 3 Rev. St. (Birdseye's Ed.) p. 3345, sec. 53. The second will, by its terms, not only does not in any way affirm the first will, but by express words revokes the same. There is no proof showing that since the revocation the testator has in any way republished the will of 1883, and there are the best of reasons shown why he should not desire to revive that will.

It is urged by the counsel for the proponent that the will of 1884 has not been established, for the reason that it has not been shown that at the time of its execution the testator was of sound mind and memory, and competent to execute it. While the subscribing witnesses have not testified directly upon the question of the competency or incompetency of the testator on October 1, 1884, yet I think from the evidence in the case the conclusion can justly be drawn that the testator was at the time competent to make a will. It is quite evident that, at the time of the making of the will of 1884, the scrivener had before him the will of 1883, as the language used in each of the two instruments is quite similar. Again, it does appear by the witnesses that in September, 1883, the testator was competent to make a valid will, and there is nothing showing that there was any change in his condition of mind subsequent to that time up to October 1, 1884. The will of 1884 differs but slightly from the will of 1883. At the time Charles made the last will he came to Cortland and had it drawn; went to the same person to have it drawn who had drawn the former will, and also who was one of the subscribing witnesses; requested Mr. Stone, who was

a subscribing witness to the will of 1883, to be a witness to the second will. It appears that he had some conversation with his aunt about certain provisions contained in the will, and arranged for her taking and keeping the will in her possession. His death did not occur until the 15th day of September, 1892, eight years after the making of the will, and in the meantime he had been engaged as a party in a sturdy litigation in the courts. His first wife had died, and he had married again. From March 15, 1884, up to September 17, 1884, he came into possession of a considerable property from his father's estate, the same being paid to him by the administrators of the estate; and even the fact of his destroying the will of 1884, under the existing circumstances, I do not think argues against the mental capacity of the deceased husband and father. The proof, so far as it bears upon the question of testamentary capacity of the deceased, shows that he was of sound and disposing mind, competent to make a valid will at the time of making the last will, and would not justify or warrant the finding of mental incapacity at that time. It seems to me very clear that the will offered for probate was duly revoked by the testator, and that probate of the same must be denied. As these proceedings have been instituted in good faith by the executor, he is allowed his costs and necessary disbursements of the proceeding, the same to be taxed before the surrogate, and paid out of the estate; and a decree may be entered accordingly.

(Note as to revocation of wills:)

STATUTORY PROVISIONS.—WHEN THERE IS REVOCATION.—
WHEN THERE IS NO REVOCATION.

STATUTORY PROVISIONS.

The statutory provisions as to revocation of wills are comprised in 2 Rev. St. 64, chap. 6, tit. 1.

Section 42 provides that no will in writing except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or altera-

tion, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some other person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator and the fact of such injury or destruction, shall be proved by at least two witnesses.

Section 43. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received.

Section 44. A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage.

Section 45. A bond, agreement, or covenant, made for a valuable consideration, by a testator to convey any property devised or bequeathed in any will, previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

Section 46. A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed, but the devises and legacies therein contained shall pass and take effect, subject to such charge and incumbrance.

Section 47. A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property previously devised or bequeathed by him shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator,

which would otherwise descend to his heirs or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.

Section 48. But if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of such provisions, devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

Section 53. If after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling, or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless, after such destruction, cancelling or revocation, he shall duly republish his first will.

Section 59. The provisions of this title in relation to the revocation of wills, shall apply to all wills made by any testator who shall be living at the expiration of one year from the time (January 1st, 1830) this chapter shall take effect.

Section 70. The provisions of this title shall not be construed to impair the validity of the execution of any will made before this chapter shall take effect, or to affect the construction of any such will.

Section 71. The term "will" as used in this chapter, shall include all codicils as well as wills.

WHEN THERE IS REVOCATION.

The revocation of a will executed in duplicate will be presumed, although one copy only was proved to have been destroyed by testatrix with the intention of revoking it, it appearing that the other had not been seen any time after its execution in testatrix's possession. (*Asinari v. Bangs*, 3 Dem. 385.)

If a will was last seen in the possession of decedent, and it cannot be found subsequently after his death, *held*, that it must be presumed that he destroyed it with the intention of revoking it. (*Matter of Nichols*, 40 Hun, 387.)

Testator made his will in 1883, and a codicil on April 28, 1884. He maintained sexual intercourse with his servant from 1883 (soon after the death of his wife) till his death in May, 1886. After his death, his servant obtained a judgment award-

ing her dower, the jury finding that owing to the relations of the parties they had intermarried some time between 1883 and testator's death. A child of the marriage was born after testator's death. By the codicil testator had left a legacy to his wife, describing her as a former servant of his late wife, and left another legacy to a child born of the relation between them on 29th February, 1884, describing such child as the child of his said servant. *Held*, that as the evidence rendered it impossible to infer a marriage contract earlier than July, 1884, the will and codicil were revoked by the subsequent marriage and birth of issue. (Matter of Gall, 32 St. Rep. 695, 10 Supp. 661; aff'g 31 St. Rep. 954, 9 Supp. 466.)

A will made by a widow is (as she is an unmarried woman within the meaning of 2 Rev. St. 64, sec. 44) revoked by her remarriage. (Matter of Kaufman, 131 N. Y. 620, 30 N. E. 242, 43 St. Rep. 282; aff'g 40 St. Rep. 550, 61 Hun, 331, 16 Supp. 113.)

When the provisions of a codicil are inseparably blended with those of a will upon which part of the codicil is written, the revocation of the latter by cancellation of the signature revokes the will. (Matter of Brookman, 11 Misc. 675, 33 Supp. [67 St. Rep.] 575.)

The same mental condition is required in a testator for a valid destruction as for a valid execution of his will. (Matter of Waldron, 19 Misc. 333, 44 Supp. [77 St. Rep.] 353.)

When the draft of a will revoking all other wills is produced by the attorney who drew it, and the execution of the original of such will is satisfactorily proved, although the original itself was not found after decedent's death, *held*, that probate of a prior will must be refused, as even if the second will were revoked, the first would not, in the absence of the circumstances required by 2 Rev. St. 64, sec. 53, be revived. (Matter of Myers, 28 Misc. 359, 59 Supp. [93 St. Rep.] 908.)

If a will be revoked by "some other writing of the testator declaring such revocation" (2 Rev. St. 64, sec. 42), it is "executed with the same formalities with which the will itself was required by law to be executed" (*id.*), when the formality required in the making of a will shall be applied to the "other writing" or paper of revocation, so far as the latter, from its nature and character, is susceptible of having the same formalities observed. So held in Matter of Backus, 49 App. Div. 410, 63 Supp. (97 St. Rep.) 544; rev'g 29 Misc. 448, 61 Supp. (95

St. Rep.) 1070. In that case a testator executed a deed conveying all his property upon trust for his use and benefit, and that of his two children, during his life, and after his death upon trust for his children, and the instrument contained a clause revoking any previous will executed by him. The deed was executed in the presence of three subscribing witnesses to whom the deed was read over previous to their signing, and to whom grantor stated that the instrument was his "act and deed." All the formalities as to the execution of a will were complied with except publication as a will, and it was *held* that the deed clearly revoked the will, even as to after-acquired property, within the meaning of the statute.

A decedent executed a deed of lands in favor of his nephew, and gave the deed to his attorney, asking him to deliver the deed to his nephew after his (decedent's) death. Decedent subsequently executed a will devising the same property to his wife. *Held*, that as the deed was not to operate till testator's death, it took effect as a will, and was therefore revoked by the will in favor of decedent's wife. (Rochester Savings Bank v. Bailey, 34 Misc. 247, 69 Supp. 163.)

WHERE THERE IS NO REVOCATION.

A revoked will may be revived without re-execution by the execution of a codicil thereto. (Matter of Knapp, 51 St. Rep. 517, 23 Supp. 282.)

A testator left all his property to his collateral relatives. Subsequently he adopted a child. *Held*, that the will was not thereby revoked. (Matter of Gregory, 15 Misc. 407, 73 St. Rep. 3, 37 Supp. 925.)

If a child born after the execution of his parent's will is provided for therein, he cannot claim the benefit of 2 Rev. St. 65, sec. 49, providing that he shall be entitled to a child's portion as if his parent had died intestate, even although the provision made by the will might not be thought by the court to be adequate. (Minot v. Minot, 17 App. Div. 521, 45 Supp. [79 St. Rep.] 554.)

Decedent, at the time she made her will, was a married woman living with her husband. She subsequently became a widow and remarried. *Held*, that her will was not thereby revoked. (Matter of McLarney, 153 N. Y. 418.)

In Matter of Ackels, 23 Misc. 321, 52 Supp. (86 St. Rep.) 246, it was held that a will originally written on one full sheet

of foolscap paper was not revoked and was entitled to probate, although the sheet had been cut in two—the first part containing the disposing clauses of the will, and the second the testatrix's and witnesses' signatures and attestation clause, no revocation by cancelling in the presence of two witnesses as required by 2 Rev. Stat. 64, sec. 42, being shown, and although testatrix might have disposed of all her property in her lifetime.

Under the second sentence of 2 Rev. St. 64, sec. 53, providing that the only other method of reviving a prior will where it has been revoked by a second, which has been destroyed, shall be by republication of the first will—such republication to be effectual must be in the presence of the attesting witnesses to the first will. (Matter of Stickney, 161 N. Y. 42, 55 N. E. 396.)

A will offered for probate was dated March 6, 1896. It was alleged that it was revoked by a later will executed about May, 1897. Neither the alleged later will nor a copy of it was produced. One of the witnesses testified that he witnessed a will other than that offered for probate, but could not recollect in what year or month, nor what were its contents. The other testified that he drew and witnessed a will in 1897, but could not fix the date other than the year, and could only remember that it contained a revocation clause. *Held*, that the evidence of a later will was too indefinite to authorize a denial of probate to the paper before the court, especially as the latter had been found locked in a drawer of decedent's safe, alone by itself, a day or two after his death. (*In re Williams' Will*, 34 Misc. 748, 70 Supp. [104 St. Rep.] 1055.)

In the Matter of the Estate of FRANK LINSLEY JAMES, Deceased.

(*Surrogate's Court, New York County, Filed December 15, 1893.*)

1. TAX—TRANSFER.

Neither the alienage nor the non-residence of a legatee or annuitant entitles him to an exemption.

2. SAME.

Nor of the testator, since the act of 1887 went into effect.

3. SAME.

In such case, the legacies will be taxed in the proportion that the assets bear to the foreign assets.

4. SAME.

The exemption of a certain class of corporations from such tax does not apply to foreign corporations.

Appeal from order of appraisement.

Parsons, Shepard & Ogden, for appellant; Edward S. Kaufman, for comptroller of City of New York.

RANSOM, S.—Neither the alienage nor the non-residence of a legatee or annuitant entitles him to an exemption; neither does the alienage or non-residence of the testator since the act of 1887 went into effect. *In re Romaine's Estate*, 127 N. Y. 86, 38 St. Rep. 76; *In re Enston*, 113 N. Y. 181, 22 St. Rep. 569. I can find nothing in the act which, when both the legatee and the testator are aliens or non-residents, gives to the alien legatee a benefit not conferred upon citizens and residents of this State. There might be a question if the legacies were demonstrative in their character; but it is not claimed that the English assets were made exclusively liable to the payment of the annuitants and legatees on whose behalf this appeal has been taken, nor is it claimed that the entire estate, wherever situated, would not be liable for their payment. The theory upon which the appraiser has acted seems to me to be the correct one, viz.: In the proportion that the assets in this jurisdiction bear to the foreign assets, it is to be resorted to for the payment of debts and legacies, and to that extent the legacies are taxable. The exemption of certain corporations, organized for other than business purposes, from the operation of this act, does not include foreign corporations. *In re Prime's Estate*, 136 N. Y. 347, 49 St. Rep. 658. I have heretofore passed upon the liability to taxation when the assets consist of bonds and stocks of foreign corporations, the certificates for which are kept within this State, adversely to the claim of the appellant. *Estate of Bondon*, Surr. Dec. 1892, p. 115, and cases cited.

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ACCOUNTING—

On the judicial settlement of the accounts of an executor or administrator he may prove any debt due to him from the decedent, but not one due to himself and others. *Matter of Jones*.....99

On the judicial settlement of his accounts, an executor cannot obtain a decree directing a residuary legatee to whom the executor has knowingly paid the entire residue, to refund the amount of his expenses, and a debt due him, and his commissions, and costs of accounting, but must seek for relief elsewhere. *Lang v. Howell*.....243

An executor sold certain lots of the estate to persons who did not complete their purchases, as the same were bought in behalf of the executor, his sister or the widow. The nominal purchasers assigned their bids without consideration to the sister, who, after receiving a conveyance thereof from the executor, conveyed same at the executor's request to the widow. *Held*, that on such sale to the widow, the executor cannot be allowed the value of the widow's dower as a payment to the widow, as the sale made by him must be presumed to have been made subject to the right of dower, and, if not, the executor was not authorized to purchase her dower, and, on the other hand, if she had no dower, the payment was without consideration. *Matter of Smith*271

An executor has the right to make repairs to preserve the property and to obtain a proper income therefrom, and proof must be given that such expenditure was not necessary, before the item will be disallowed. *Id.*..... 271

As the will expressly provided that the widow should pay taxes out of income, such payments are not chargeable against the principal estate unless it appeared there was insufficient income for the purpose, and that such payments became necessary for the preservation of the estate. *Id.*..... 271

As the executor was clothed with trust authority over the estate, items for insurance are proper credits when, although not expressly, they were impliedly, authorized by the will, and the payments were necessary to the preservation of the property. *Id.*.....271

In the absence of explanation, an item for repairs to property paid two years after its sale, will not be allowed. *Id.*.....271

A credit will not be allowed for the amount of a judgment against the executor's brother, when it has no connection with the administra-

tion of the estate, and the proof shows that it is a personal matter between the executor and his brother. Id.....271

Items for expenses in making a resale of real estate will be allowed, when the resale was directed by the court, and the sums were necessarily incurred to carry out such direction. Id.....271

Legal services rendered to the widow cannot be charged to the estate. Id. 271

Goods furnished by the executor to the widow cannot be allowed against the principal. Same, if chargeable, can be only treated as a payment on account of income to her, and when the proof is insufficient to establish such, or that value in kind supplied a legatee was a payment on account of the legacy, the credits cannot stand. and the executor must seek redress in some other court. Id.....271

Payment of interest on a mortgage which was the individual obligation of the executor, given by him upon a lot of the estate after he became the purchaser thereof from his brother, and which accrued between the first sale thereof and a resale ordered by the court, will not be allowed. Id..... 271

Credit for costs paid in two suits brought in the Supreme Court against the executor will be allowed when the judgment rolls show a recovery against the executor as such, and not against him personally. Id. 271

An executor does not become entitled to reimbursement for sums expended for legal services by showing the fact of payment, or that he acted in good faith. Upon objection made, he must prove the necessity and value of such services. Id.....271

When the profits of a business carried on by the executors jointly with a third person are not accounted for during a certain period, and there is no proof that the same were received by the accounting executors, or that the same were lost to the estate by their negligence, they should not be charged therewith, especially upon the contention of a contestant who was himself an executor during the period in question, and who had special supervision over the business out of which the profits arose, but who had been subsequently removed from the executorship. Matter of Archer292

Testator devised all his property to his executors upon trust to receive the income thereof during the life of his widow, and pay the same to his widow and children, and he directed that should his sons C. and G. and his wife desire to reside in his dwelling house they might do so without paying rent therefor during his wife's lifetime, each paying one-third of the living expenses of the household. Held, that the widow and such children did not take an estate in the dwelling house analogous to a life estate, so as to charge them with repairs and taxes, as the executors took a legal title, with the duty not only of receiving the income, but of discharging thereout all taxes, insurance and repairs, and pay over the balance in accordance with the directions of the will. Id.....292

To entitle the executors to credit for the price of goods of the estate sold by them, and which the purchaser owes the estate, it should be shown to be uncollectible without their fault, or that actual credit has been given (and not merely intended to be given) in the nature of a payment or set-off on an account or claim against the estate. *Id.*...292

When there is no voucher for an expenditure, the burden is upon the executors to establish the credit by the uncontradicted oath of the accounting party, stating positively the fact of payment, etc. Code Civ. Pro. sec. 2734. *Id.*.....292

Contestant will be charged with a debt due by him to the estate, when the same appears by the evidence of one of the executors to be the balance due by contestant out of wood and brick transactions between him and the estate, although the contestant claims that the item was the amount of a loan made by him to the executors and repaid to him, when his testimony is unsupported, and as he was himself an acting executor at the time, he could have had an entry made in the executors' books, showing that it was a loan, the actual entry being "Dif. in brick and wood account, \$277.66." *Id.*.....292

Items of an executors' account for administration expenses, including professional services, in the absence of proof that such services were necessary for the protection or administration of the estate, and that the sum charged is reasonable in amount, should be disallowed.

Id. 292

Testator provided that should his son (the contestant) desire to reside where he now does (being a dwelling, part of testator's estate), he might do so without paying any rent during the testator's wife's lifetime. Contestant, after living in the dwelling for some time, removed elsewhere during the widow's life, whereupon the executors (who were directed by the will to receive the income of testator's property and apply the same as directed) let same to other tenants and received the rents thereof. *Held*, that the contestant was not entitled to such rents, as the will gave him only a right of occupancy during the widow's life, and that they belonged to the trust estate. *Id.*...292

When it appeared that the one-half interest in a barge, the other half of which was owned by the estate, was purchased for a consideration of \$2,300, and the bill of sale thereof taken in the name of one of the executors, who claimed that he purchased individually, but all the circumstances connected with the purchase and the relation of the parties, showed that the purchase was in the interest of the estate, the profits of the barge paying the purchase money, save \$50 paid by the executor to whom the bill of sale was given. *Held*, that the purchase was one for the estate, and that the property thereby acquired, and the earnings thereof, should be accounted for as estate property and assets. *Id.*..... 292

An executor who is directed by the will to sell his testator's real estate, invest the proceeds, pay the interest of one moiety semi-annually to testator's daughter for life, and upon her death, leaving issue, divide

the principal equally amongst the children on their attaining 21, being a testamentary trustee, whose duties as such are separable from his duties as executor (Code Civ. Pro. sec. 2514, subd. 6), is liable to account for the proceeds of sales made by him, in the Surrogate's Court (Code Civ. Pro. secs. 2801-11). *Matter of Valentine*.....310

On such an accounting, the court has only power to charge the trustee with any proceeds of sale he has omitted to charge himself with, and (Code Civ. Pro. sec. 2811) decree payment and distribution. It cannot inquire into the validity of any sales of real estate made by the executor, by reason of fraud and the like. *Id.*..... 310

To entitle an executor to credit for payments for which he produces no vouchers, he must give competent evidence of such payment "other than his own oath." Code Civ. Pro. sec. 2734. *Matter of Gerow*..364

An executor cannot deduct a sum in excess of his legal commissions, nor can he retain same until judicially allowed. *Id.*.....364

A testator devised and bequeathed to his wife, the use, occupation, income and profit of all his real and personal estate for her life, and directed that two of his sons (also named as his executors) should cut, haul and prepare for burning, firewood sufficient for her use. No duties were charged upon the executors with respect to the application of the income. *Held*, that the gift of the income of the real estate to the wife created an estate in the realty itself, and that the executors were not bound to account for the income of the real estate, or as to the cutting of wood and timber. *Matter of Goetchius*..... 371

In such case the executors retained the custody and management of the personal estate. *Held*, that if the income was collected by them without power under the will, they were only liable individually, and the court had no power to entertain an accounting therefor. *Id.*.. 371

The executors invested part of the personal estate and used the remainder for their individual purposes. They paid the widow the income of the investments, and for legal interest on the moneys expended for their own use they paid her with cash, goods from their store, and by paying taxes for her. The evidence of witnesses other than that of the executors was given of payments in money and kind to the widow, who, it was also shown, paid sometimes for goods received from the executors. *Held*, that even if the latter were accountable for the income of the personal estate, the evidence was insufficient to charge them with any balance of income for which they were liable to pay the widow or her executors. *Id.*..... 371

One of the executors died during the widow's life. *Held*, that the survivor was accountable for the principal personal estate, except as to the value of articles of personal property which he placed in charge of the widow for her use, and which were lost by ordinary use and wear. *Id.*.....371

The decedent executor had purchased part of the personal estate, for which he did not pay. *Held*, that as he had an equal right to the custody of the property of the estate, the surviving executor was not liable

for the purchase price. *Id.*.....371

When the executors could, out of moneys in their hands, have paid off the amount of a note due by testator, within a reasonable time after they entered upon their administration of the estate, they will not be allowed for accruing interest paid on the note. *Id.*.....371

An item for legal services on the accounting cannot be properly charged in the account. Such is a matter for adjustment upon the allowance and taxation of costs in the proceeding. *Id.*.....371

An executor who has been forced to account by process of the court, and who has failed to sustain many items thereof, will be only allowed costs as if there were no contest. *Matter of Goetchius*.....379

Contestants who have forced an executor to account, and who have successfully contested nearly all the items of his account, will be allowed out of the estate, if not against the executor personally, costs of compelling the executor to account, for time occupied in the trial. and a contest fee, but not for time occupied in preparing for trial.

Id. 379

When there is a doubt as to whether the executor, as such, received and disbursed the income of personal estate, during the continuance of a life estate, and that even if he had, there was no balance due by him on foot of such income, costs will not be allowed the executor or the contestant. *Id.*..... 379

If such costs were allowed, they could not be charged against the principal of the estate. *Id.*..... 379

The executor's costs in such case will not be awarded against the contestant, when the executor kept no account of the income fund.

Id. 379

An executrix, prior to her death placed certain of the funds of the estate in the hands of one who was, after her death, appointed executor. *Held*, that in respect thereto the latter could not be treated as an executor *de son tort* (2 R. S. 81, sec. 60), and that the estate of the executrix was liable to any profits earned by the funds so placed, prior to her death. *Matter of Richardson*.....384

An executor is not obliged to charge himself with the amounts of insurance policies still running, nor with interest on a fund held by a trust company in liquidation, nor with collaterals to loans out of the estate made to himself, as they are not cash in hand or its equivalent, but he should set them forth as outstanding, in schedule G.

Id. 384

An executor is chargeable with profits from the use of money belonging to the estate, as also any bonus he may have received for the loan of the funds, and if such should be less than the legal rate of interest, he is chargeable with the deficiency. *Id.*.....384

An executor and trustee is liable for dealings with the estate prior to his appointment up to the date when he assumed control of the funds. *Id.*..... 384

A credit for commissions will be disallowed, as they cannot be taken prior to accounting. *Id.*.....384

An executor should keep his own accounts when they are simple, and he will not be allowed for bookkeeper's charges, especially when any complexity arose by his own unwarranted dealings with the funds. *Id.*..... 384

A testator gave to his wife the income of all his property, both real and personal, "as long as she lives, for her benefit and support," but out of the income she was to pay all necessary repairs upon the buildings, and all taxes, etc. The only authority the executors were to exercise during the wife's life was to pay debts and funeral expenses. After her death they were directed to sell the property, and pay the legacies enumerated in the will. Testator also directed that his two sons should not come into possession of their property until after his wife's death, unless she consented thereto in writing. *Held*, that as the widow took a life estate under the will, and no title to testator's property or control thereof during the wife's lifetime was given to the executors except to pay his debts and funeral expenses, the executors were not entitled to include in their account the income of the estate collected by them during the widow's life under an arrangement with her, nor the disbursements thereout for taxes during her life, nor commissions on such collection. *Matter of Turfler*.....421

The compensation for such collection was a matter to be adjusted between the executor, as an individual, and the personal representative of the widow. *Id.*.....421

The persons interested in the estate agreed in writing with the executors that the real estate should not be sold; that for the purpose of fixing the executors' compensation the same should be treated as of a certain value; and that the executors would accept a certain agreed compensation. *Held*, that although the real estate was not sold, the beneficiaries and executor were mutually estopped, under this agreement—the former from depriving the executor of his commissions thereunder, and the latter from claiming more than the agreed compensation, which was less than the statutory allowance. *Id.*.....421

An executor's commissions should not be included in his account. Commissions are allowed only by order of the Court, and on settlement of the account. *Id.*.....421

Under the circumstances of this estate, a credit of \$950 for the services of a bookkeeper was proper, but the same should be adjusted between the income estate of the widow and the estate held by the executors. *Id.*.....421

An item of \$100 for the services of a bookkeeper in preparing the executors' account should be excluded from the account and be disposed of upon the taxation of the costs of accounting. *Id.*.....421

A surviving administrator is not liable to account for the assets of the estate when nearly the entire thereof fell into the hands of his co-administrator, deceased, whether they were originally taken by the

latter, or handed to him by the surviving administrator. *Matter of Van Wert* 473

The statute of limitations may be invoked as a protection by an accounting administrator, notwithstanding that he has voluntarily accounted. *Id.*..... 473

Interest received on securities other than such as was accruing at intestate's death, is not a portion of the assets so as to affect the running of the statute of limitations. *Id.*.....473

In such case payments by the administrator to his co-administrator, who was also next of kin, within the statutory period will not take the case out of the statute. *Id.*.....473

On accounting, a surviving administrator is not obliged to produce vouchers for moneys handed to his co-administrator, as such, as they are not payments, and vouchers are only required for payments made of debts or shares or other liabilities. *Id.*.....473

An administrator who is an attorney will not be allowed his costs and charges in actions in which he was concerned as attorney. *Id.*...473

An administrator will not be allowed for moneys paid to his counsel for services requiring no legal skill, and which the administrator himself might have performed. *Matter of Van Nostrand*.....495

In such case a payment (*inter alia*) to counsel for the administrator for attending at an auction sale will be disallowed as to so much thereof as might be over and above what might be allowed a clerk if it were essential that a clerk should be employed. *Id.*.....495

In case of an equitable conversion of realty, where the estate is held by the executors unconverted, they are not entitled to commissions on the principal. *Matter of McLaren*585

The value of the real estate, in such case, may be considered in determining the commissions to which they are entitled on the income.

Id. 585

ACKNOWLEDGMENT—

A certificate of authority of the officer taking the acknowledgment of satisfaction of a surrogate's decree, in another State, which states that such officer "was duly authorized to take the same," is not sufficient; but such certificate should specify that such officer was one authorized by the laws of that State to take the acknowledgment of deeds. *Matter of Wilcox* 182

ADEMPTION—

Testatrix provided by her will that her property should be sold and the proceeds equally divided amongst her five children. After the execution thereof she made advances to them, and took a receipt from each which expressed that testator intended to advance each \$5,000. Three of the receipts were for the full sum of \$5,000, but two were for less than that sum. After testatrix's death, her executor, prior to an equal distribution of the assets, paid to each of the two children who had received less than \$5,000 the difference necessary to make up

the \$5,000 which testatrix intended to give each in her lifetime. *Held*, that the payments so made were authoritatively made as advances or payments, to carry out the intention of the testatrix to equalize the distribution of her property among all of her children. *Matter of Turfler*389

The principle of ademption of a legacy is applicable to a bequest of residue. *Id.*.....389

In such case the proposition that the rule of ademption is only predicable of legacies of personal estate, and is not applicable to devises of realty, does not apply, as the will devised the real estate to the executor in trust to sell the same and divide the proceeds, and in any event, as the executor had received \$24,000 of personalty, and applying the rule of ademption to only a bequest of personalty, strictly such, the payments to the two children in question were properly made. *Id.*..... 389

When one of such residuary legatees gave her assent without qualification to the making of the payments so as to equalize the two children who had received less than \$5,000 with the other children, and withheld objections to the same being made, knowing that the same were being made, or were about being made, until the payments were actually made, and then first interposed objections, *held*, that such legatee was estopped from claiming that such payments were illegally and improperly made. *Id.* 389

ADMINISTRATION—

Administration cannot be granted where the deceased left a document purporting to be a will until the question of the validity of the will has been disposed of, notwithstanding the declared purpose of the next of kin not to offer it for probate. *Matter of Taggart*.....8

No obligation rests on the next of kin to bring the will to probate in order to avoid administration being taken, but a creditor of deceased who seeks letters of administration may, if he so desires, bring proceedings for probate to determine the validity of such will. *Id.*....8

As legatees are, under Code Civ. Pro. section 2643, subd. 2, each entitled to apply for letters c. t. a. without citing the others, an application by a legatee to revoke such letters granted to another legatee will be denied, when the surrogate who granted such letters did not, in his discretion, deem it advisable to have everybody interested in the estate notified of the application. *Matter of Wood*.....25

Other things being equal, the court, in a case where there are opposing claims, will issue letters c. t. a. to a male in preference to a female, although the preference of males to females in case of intestacy (4 Rev. Stat. 8th ed. p. 2552) was as to administration c. t. a., abolished by the enactment of Code Civ. Pro. section 2643, substituted for 3 Rev. Stat. (6th ed.) p. 74, providing for the issuance of letters with like restrictions as in cases of intestacy. *Id.*..... 25

One is a legatee entitled to apply for administration c. t. a. (Code

Civ. Pro. section 2643), although not named in the will as a legatee, when she was entitled as an heir of a legatee named in the will to a share in the fund thereby bequeathed. *Id.*.....25

The statutes of descents (1 Rev. St. p. 754, secs. 23-26) and of distributions (2 Rev. St. p. 96, secs. 75-77) as to advancements, only relate to cases of intestacy. *Matter of Turfler*.....389

ALTERATIONS IN WILLS—

An interlineation, crasure or other alteration made in a will, either by the testator or a stranger, after due execution of the instrument, without a new attestation, does not avoid the instrument, but the court may disregard the same and probate the will according to its original language, when that can be ascertained. *Matter of Wilcox*.....204

Where alterations appear on the face of a testamentary disposition of property, such alterations are presumed to have been made after execution, rendering it necessary for those seeking to establish a will containing such apparent defects to overcome such presumption by proof, direct or inferential. This is an exception to the general rule as to other instruments, which provides that such alterations, in the absence of proof to the contrary, are presumed to have been made before the execution of the writing in which they appear. *Matter of Carver* 316

Although as a general rule a material alteration in written documents, made after execution, for fraudulent purposes, vitiates the entire instrument, the effect of an unauthorized and unauthenticated alteration in a will, made after execution, is to render the change inoperative, leaving the will to stand in form and effect as before such alteration was attempted. *Id.*.....316

A testator bequeathed to his wife \$400 annually out of his personal estate, also all his household furniture, goods, books, pictures, organ, clothing, etc., to be accepted in lieu of dower. It was claimed that the words "to be accepted in lieu of dower" were fraudulently inserted after execution. *Held*, that as the words "clothing, etc., to be accepted in lieu of dower" were written upon and constituted one entire line in regular order, and were not crowded, and the only person to be prejudiced by such words, viz., the widow, urged probate of the will as it stood, and the family physician, who had witnessed the will, and carefully examined it at the time of execution, testified he observed no alteration therein, the words in question were not inserted after execution, although the letters in such words were somewhat heavier and of a darker shade than most of the other parts of the will, but not of particular portions thereof. *Id.*..... 316

ANTE-NUPTIAL CONTRACT—

Decedent, when 70 years of age, married his deceased wife's niece, aged 52. He was then worth \$20,000. Prior to the marriage he had an agreement drawn up by his attorney by which his intended wife was

to receive on his death \$2,000 in lieu of dower and interest in decedent's personal estate. This was signed by decedent and his wife the evening prior to the marriage, and there was no evidence of prior negotiation in reference thereto. The wife testified it was not read to her, and she only became aware of its contents after the marriage, and decedent admitted to several persons that in having the paper signed he wished to convince his sisters that his wife had not married him for his money. *Held*, that although the wife had subsequent to the marriage acquiesced in the agreement, the burden of proof which the law placed upon the husband's representatives to show perfect good faith had not been met with, and the agreement was invalid. *Matter of Jones*...454

The presumption is against the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith, and strict proof will be required, especially where the provision for the widow is inequitable. *Id.*.....454

APPEAL—

Under Supreme Court Rule 32, a surrogate may permit service of a case and exceptions after expiration of the time therefor. *Matter of Williams* 574

APPRAISEMENT—

While the decree of the surrogate in a proceeding under section 13 of the collateral inheritance tax act is conclusive upon the State and the property affected thereby cannot be reappraised, yet where property was withheld from the appraiser, whether intentionally or otherwise, assessed in proceedings under sections 16 and 17. *Matter of Smith*.

150

In making appraisement of estate subject to the transfer tax, debts, funeral and administration expenses are not to be deducted. *Matter of Millward*586

The surrogate, in fixing such value, may deduct the debts owing by decedent from the value of the estate. *Id.*..... 586

ATTORNEY-AT-LAW—

When an attorney is paid for services requiring legal skill, and he testifies that the amount fairly compensated him, the court will, in the absence of evidence to the contrary, and when it cannot be guided by its personal knowledge, allow the charge. *Matter of Van Nostrand*, 495

BOND—

Where it appears that subsequent to the making of a will the relations existing between the testator and the persons named as executors became changed so as to warrant a conclusion that they would not have been selected as executors at a subsequent date, and that the testator had an intention of changing them, the rule that they occupy that position by reason of the personal confidence and trust of the testator in

them fails, and the court may consider their pecuniary circumstances and qualifications; and where it appears that the estate is large, and the executors have little or no pecuniary means, and their business habits and experience have not qualified them for the management of important pecuniary responsibilities, may require security for the faithful performance of their duties. *Matter of O'Brien*..... 41

It having been provided by articles of copartnership that on the death of one of two partners, the surviving partner might agree with the representative of the decedent as to the continuation or sale of the business, *held*, that as, on the death of one of the partners, the only executor who qualified was the surviving partner, and as he could not therefore agree with himself as to the matters mentioned in the articles, he should, pending an appeal by him as to the amount due to the estate by the firm, give bond, under Code Civ. Pro. sec. 2687, subd. 3, for the funds (representing decedent's interest in the firm) retained by him as executor, the testator's widow and one of the petitioners having consented to such retention pending the convenient winding up of the business. *Matter of Leavitt*.....74

The surrogate has no authority to extend, as a matter of favor, the time of an executor to file his bond under Code Civ. Pro. sec. 2687, beyond the five days therein provided, yet he may, under Code Civ. Pro. secs. 724, 2538, relieve a party from an order taken against him when he can show it occurred through mistake, inadvertence, or excusable negligence, and the same relief may be obtained under Code Civ. Pro. sec. 2481, subd. 6, for fraud, newly discovered evidence, clerical error, or other sufficient cause. *Matter of Filley*.....234

A decree having been made, under Code Civ. Pro. sec. 2687, requiring an executor to give bond within five days, it will not be reopened under Code Civ. Pro. sec. 2481, subd. 6, on the ground of the alleged newly discovered evidence that real estate which the executor on the application for the bond, alleged to be of less value than stated, and in respect of which he subsequently furnished proof that it was, upon the assumption that it belonged to testator at the time of his death, of a certain value, had been really conveyed by the decedent to the executor, who conveyed it to another, when such facts were obviously known to the executor at the time of the application. *Id.*.....234

The court may require a bond from an executor covering property alleged to have been fraudulently conveyed by his decedent. *Id.*.....234

On an application by an alleged creditor of a decedent, whose will was probated in a foreign State, and the executors of which were appointed ancillary administrators here, to have the penalty of their bond increased so as to cover her indebtedness, the court cannot try the question of the alleged indebtedness, although disputed. *Matter of Govan* 387

Ancillary administrators having been appointed and duly qualifying (Code Civ. Pro. sec. 2667) by giving bond in \$120, being double the amount of a debt (\$60) alleged by them to be due by decedent to a

resident in New York, the assets in this State being also alleged to be under \$100 in value, *held*, that the application of an alleged creditor to the extent of \$240 to have the bond increased to \$600 penalty should be denied, as the only object of the bond was to secure the creditors to the extent of the value of the assets. *Id.*.....387

BURDEN OF PROOF—

Decedent when 70 years of age married his deceased wife's niece, aged 52. He was then worth \$20,000. Prior to the marriage he had an agreement drawn up by his attorney by which his intended wife was to receive on his death \$2,000 in lieu of dower and interest in decedent's personal estate. This was signed by decedent and his wife the evening prior to the marriage, and there was no evidence of prior negotiation in reference thereto. The wife testified it was not read to her, and she only became aware of its contents after the marriage, and decedent admitted to several persons that in having the paper signed he wished to convince his sisters that his wife had not married him for his money. *Held*, that although the wife had subsequent to the marriage acquiesced in the agreement, the burden of proof which the law placed upon the husband's representatives to show perfect good faith had not been met with, and the agreement was invalid. *Matter of Jones*...454

The presumption is against the validity of such a contract, and the burden of proof is cast upon the husband or his representatives to show perfect good faith, and strict proof will be required, especially where the provision for the widow is inequitable.....454

CHARITABLE BEQUESTS—

A bequest of residuary real and personal estate to executors, "to be expended by them for benevolent and charitable purposes, as they, or the survivor of them, shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world," is void, there being no certain designated beneficiary. *Matter of Jackson*241

CLAIM AGAINST DECEDENT—

If, by agreement between tenants in common, the common property is used for the purpose of making a profit, either tenant in common may have an accounting in equity of the rents and profits and disbursements, and the tenant to whom there is found a balance due will have an equitable lien upon and right to reimbursement out of the share of the common property from which such balance is found due. *Matter of Lucy* 117

The owners of a farm agreed that one of them should carry on a dairy and general farming business thereon, the products to be divided between them in a certain manner. The business was so carried on until the death of the one conducting it, who received the moneys from sales and mingled the same with his other money, and the other tenant

received nothing. The estate proved insolvent. *Held*, that the co-tenant was entitled to be paid in full for his share of the profits out of the moneys so received, and, if necessary, out of the proceeds of any property owned by the parties in common and used in the business, and that only so much as remained after such payment should be considered assets for the payment of general creditors. *Id.*.....117

The surrogate, upon an accounting by the personal representative of a deceased executor, may determine the validity of a claim of such deceased executor against the estate of testator. *Matter of Cooper*, 563

COLLATERAL INHERITANCE TAX—

Testator, who had no wife or children, held a note of the executor, who was an intimate friend. During his last illness he asked his niece to bring his papers, and gave her this note, telling her that he had given it to Crosby; that he knew of it, that she was to keep it, and that he did not want his heirs to know anything about it. *Held*, that as this constituted a valid gift *causa mortis* of the note to the executor, and that as there was a sufficient delivery, the executor received said note subject to the collateral inheritance tax. *Matter of Crosby* 28

Testator, after making a will giving his property to his wife and issue, executed a deed of trust by which he transferred his property in trust for the support and maintenance of himself and family and on his death to distribute it according to the provisions of the will. *Held*, that the legatees took by virtue of the will and not the deed, and that the law in force at the death of testator should govern, and such death having taken place subsequent to the passage of the act of 1891, the interests of the wife and children were taxable. *Matter of Johnson* 68

While the decree of the surrogate in a proceeding under section 13 of the act is conclusive upon the State, and the property affected thereby cannot be reappraised; yet where property was withheld from the appraiser, whether intentionally or otherwise, and therefore was not appraised, such omitted property may be assessed in proceedings under sections 16 and 17. *Matter of Smith*.....150

One who has been brought up by testator from childhood and treated as one of the family, although not adopted by him, is one to whom he stood in the relation of a parent within the meaning of the statute. *Matter of Wheeler*160

While real estate which descends or is devised directly to wife or children is not taxable, yet if the decedent makes such a testamentary disposition of his real estate as to convert it into personalty, the shares of the legatees under such a will are liable. *Id.*.....160

A large part of testator's real estate was partnership property, and the actual value of his interest depended largely on the manner in which it was controlled. The will directed the executors to continue in the partnership until it might be disposed of to the best advantage.

Held, a proper case for postponement of the assessment and collection of the tax until the parties entitled came into actual possession.

Id. 160

A large part of testator's estate consisted of bonds and mortgages on lands in Michigan, and notes, all held by his agent in that State. *Held*, that such property, although actually out of the State at the time of testator's death, nevertheless was in his possession and passed under his will, and hence was subject to tax under the collateral inheritance tax law. Matter of Corning178

The deceased was a co-tenant of certain property with her sister, the mother of petitioners, and resided thereon with her sister's family until her sister's death, without any agreement as to board or payment of rent. After the sister's death she continued to reside there in the same manner. After their father's death the petitioners continued to work the farm in the same manner as formerly and deceased continued to reside with them until her death. *Held*, that this was not sufficient to constitute the relation of parent and child between them so as to justify an exemption from tax upon the property received by them from her. Matter of Sweetland.....200

When an assessment was not made on legacies to legatees who stood in the relation of adopted children to testatrix for more than ten years prior to her death, and which would have been liable to duty under the original act of 1885, ch. 483, the tax having accrued prior to the amendment of ch. 713 of 1887, exempting such legacies from taxation—*held*, that under section 25 of the act as amended by Laws 1889, ch. 479, the legatees were entitled to the benefit of the amendment of 1887, and this right was not affected by Laws of 1892, ch. 399, sec. 23, repealing the act of 1889, as the saving clause of the act of 1892 preserved prior rights. Matter of Thomas.....464

Money, being part of the distributive share of decedent in the estate of a deceased sister who resided at her death in another State, and no part of which had come into decedent's possession prior to her death, but had been remitted directly by the trustee of the sister's estate to the executor of decedent, for distribution, is not liable to taxation.

Id. 464

Stocks of foreign corporations, the dividends accruing upon which are made payable at, and which can only be transferred at, the home office of such corporations, are not property within the State, liable to taxation under the act of 1885 and amending acts, although the certificates were owned by, and in the possession of, decedent in this State.

Id. 464

Where a clause in a will recites that a legacy is given in view, and in consideration, of the legatee's unremitting care and attention to the testatrix during her years of sickness without asking any reward for services rendered, such legacy is taxable. Matter of Doty.....535

In order to be exempt, the legacy must be in payment of a legally enforceable debt. Id..... 535

The court, in ascertaining whether a legacy is, or is not, taxable, has the right to determine, not only from the provisions of the will, but by extrinsic facts, if necessary, whether it is a voluntary gift or in payment of a legally enforceable debt. *Id.*.....535

In such case, the legatee, if he desires to escape the payment of the tax, must establish his debt against the estate, have it paid by the executor in the usual manner, and let the legacy to him go to the residuary estate. *Id.*..... 535

In making appraisement of estate subject to the transfer tax, debts, funeral and administration expenses are not to be deducted. *Matter of Millward* 586

The surrogate, in fixing such value, may deduct the debts owing by decedent from the value of the estate. *Id.*.....586

A bequest to the widow for life or until remarriage, cannot be appraised until the termination of such estate. *Id.*.....586

Neither the alienage nor the non-residence of a legatee or annuitant entitles him to an exemption. *Matter of Linsly*..... 603

Nor of the testator, since the act of 1887 went into effect. *Id.*....603

In such case, the legacies will be taxed in the proportion that the assets bear to the foreign assets. *Id.*.....603

The exemption of a certain class of corporations from such tax does not apply to foreign corporations. *Id.*..... 603

CONTRACT—

A promise to pay for services will be implied, unless a presumption arises from the relation of the parties that they were rendered without any expectation of compensation. *Matter of Cooper*.....563

CORPORATIONS—

The corporate powers of the Trustees of the New York Annual Conference of the Methodist Episcopal Church did not include the right to act as trustees of property given them by testator's will, which directed them to pay over the income to the pastor of St. Paul's Church as one of the class of ministers mentioned in the statutes of incorporation (Laws 1843, ch. 131; Laws 1887, ch. 379), which provided that the trustees might take by devise or purchase, and that they should take charge of all property belonging to the New York Annual Conference, so far as the latter might direct, and appropriate same for the benefit of the itinerant, supernumerary and superannuated preachers and widows and orphans of deceased preachers in such manner as the Conference might direct, as the capacity to take a devise meant a legal devise, not a devise void under the statute of perpetuities, and there was no provision for the trustee to hold funds for the building of a parsonage directed by the will, in a certain event to be paid by the trustees. *Matter of Williams*.....414

Stocks of foreign corporations, the dividends accruing upon which are made payable at, and which can only be transferred at, the home

office of such corporations, are not property within the State, liable to inheritance taxation under the act of 1885 and amending acts, although the certificates were owned by, and in the possession of, decedent in this State. *Matter of Thomas*.....464

By section 9 of Laws of 1847, chapter 133 (general act as to rural cemeteries), it is provided that an association thereunder incorporated may take and hold property for (*inter alia*) improving the cemetery lots according to the terms of the grant, devise or bequest. *Held*, that the Oak Hill Cemetery of Nyack, whether incorporated thereunder or under the special act, Laws 1865, chapter 139, relating to Oak Hill Cemetery, Rockland County, might take and hold a legacy upon trust to apply the income for the perpetual care of a lot therein, as section 8 of latter act conferred upon said cemetery the powers contained in the general act. *Matter of Schuler*.....490

The exemption of a certain class of corporations from transfer tax does not apply to foreign corporations. *Matter of James*.....603

COSTS—

When the evidence shows that a proceeding to revoke probate of a will was not brought in good faith, the contestants should be subjected to costs. *Matter of Lowman*.....259

An executor who has been forced to account by process of the court, and who has failed to sustain many items thereof, will be only allowed costs as if there were no contest. *Matter of Goetschius*.....370

Contestants who have forced an executor to account, and who have successfully contested nearly all the items of his account, will be allowed out of the estate, if not against the executor personally, costs of compelling the executor to account, for time occupied in the trial, and a contest fee, but not for time occupied in preparing for trial.

Id. 370

When there is a doubt as to whether the executor, as such, received and disbursed the income of personal estate, during the continuance of a life estate, and that even if he had, there was no balance due by him on foot of such income, costs will not be allowed the executor or the contestant. *Id.*..... 370

If such costs were allowed, they could not be charged against the principal of the estate. *Id.*..... 370

The executor's costs in such case will not be awarded against the contestant, when the executor kept no account of the income fund.

Id. 370

When an attorney is paid for services requiring legal skill, and he testifies that the amount fairly compensated him, the court will, in the absence of evidence to the contrary, and when it cannot be guided by its personal knowledge, allow the charge. *Matter of Van Nostrand*. 495

COVENANTS—

A lease for twelve years contained a covenant by lessees that they would maintain lessor during the term, as payment for the use of the premises. Lessor died prior to the expiration of the term. *Held*, that his maintenance during his life was a full performance of the covenant by the lessees. *Matter of Williams*.....284

Such lease contained a covenant by lessee against cutting timber except for firewood and fencing purposes. Lessee, instead of repairing the fences from timber cut on the farm, sold same, and devoted the entire proceeds to purchasing other material which was used in repairing the fences. Lessee did not sell any more timber than was necessary for such repairs. *Held*, that the covenant was not substantially violated. *Id*..... 284

DECLARATIONS—

All acts or declarations, forming part of the act or transaction to be proved so as to explain or qualify it, are admissible when such transaction or act forms the fact in issue or is deemed relevant thereto. *Matter of Wheeler*.....550

DEED, DELIVERY OF—

The fact that a deed from a testator to his son, who is also his executor, is in possession of latter, is not evidence of delivery, as the executor might have come into possession of the deed in his character as executor, especially when there is an absence of any fact to support the presumption of delivery beyond the bare possession by the executor, and there is no proof of prior negotiations upon the subject of transfer, but there is proof that he was, at his death, in possession of the property. *Matter of Filley*234

DELUSIONS—

To constitute a delusion, there must be a belief in the existence as a fact of something which does not exist; and such belief must be without basis for its support, springing up without cause in the imagination of the person entertaining it, and become so firmly implanted in the mind as to withstand such evidence and argument as would convince reasonable persons of its falsity. *Matter of Smith*.....146

When decedent's son was seven years old, decedent came home intoxicated and told his wife he had been told that said son was not his child, and repeated the story at different times for thirty years, but only when intoxicated. Some years before his death he told the priest the same thing, and in his will disinherited said son. *Held*, that decedent was not the subject of a delusion which would invalidate the will. *Id*..... 146

DOMICILE—

A testator was domiciled in New York City prior to 1854, and thence till 1863 in Westchester County, where he had purchased a country residence. In 1863 he purchased a house in New York City, where he maintained a residence for twenty-five years subsequently till his death. He lived seven months each year in the New York City house, and all the evidence showed that he exercised absolute ownership thereover, although his married daughter and her husband lived with him. In 1876, on qualifying to be an executor, he described himself as a resident of New York City, and in 1887 he wrote a recommendation for his gardener, stating that if he was ever in want of a gardener for his "country place" he would take him as such. There was no evidence that he had voted subsequently to 1863. *Held*, that his domicile was in New York County, although he had made declarations under circumstances not disclosed that he had bought the New York City house for his daughter, that he had his "home" in Westchester County, that he had paid his taxes in latter county, that he had made wills in 1872 and 1885, describing himself as of Westchester County; that he had advertised his place in latter county for sale in 1888, describing himself as having lived there from 1854, and that he had written a letter in 1888 directing certain checks to be sent to his bankers, as his residence was not in "New York, but Westchester." *Matter of Zerega* 209

EQUITABLE CONVERSION—

While real estate which descends or is devised directly to wife or children is not taxable, yet if the decedent makes such a testamentary disposition of his real estate as to convert it into personalty, the shares of the legatees under such a will are liable. *Matter of Wheeler*....160

EQUITABLE MORTGAGE—

Decedent having leased his farm, subsequently made an agreement with lessee that latter would build a barn thereon, and that lessor would pay him the reasonable value of same on the expiration of the lease, and in case lessor should die meanwhile, lessee should have a legal claim against lessor's estate for the value of said barn. *Held*, that although lessor had no personal property at the making of such agreement, lessor did not intend to make the value of the barn a lien upon his estate, but merely made an admission of his indebtedness. *Matter of Williams*284

ESTOPPEL—

Testatrix provided by her will that her property should be sold and the proceeds equally divided amongst her five children. After the execution thereof she made advances to them, and took a receipt from each which expressed that testator intended to advance each \$5,000. Three of the receipts were for the full sum of \$5,000, but two were

for less than that sum. After testatrix's death, her executor, prior to an equal distribution of the assets, paid to each of the two children who had received less than \$5,000 the difference necessary to make up the \$5,000 which testatrix intended to give each in her lifetime. One of such residuary legatees gave her assent without qualification to the making of the payments so as to equalize the two children who had received less than \$5,000 with the other children, and withheld objections to the same being made, knowing that the same were being made, or were about being made, until the payments were actually made, and then first interposed objections. *Held*, that such legatee was estopped from claiming that such payments were illegally and improperly made. *Matter of Turfler*.....389

The persons interested in a decedent's estate agreed in writing with the executors that the real estate directed by the will to be sold should not be sold; that for the purpose of fixing the executors' compensation the same should be treated as of a certain value; and that the executors would accept a certain agreed compensation. *Held*, that although the real estate was not sold, the beneficiaries and executor were mutually estopped, under this agreement—the former from depriving the executor of his commissions thereunder, and the latter from claiming more than the agreed compensation, which was less than the statutory allowance. *Matter of Turfler*.....421

By the third clause of his will the testator bequeathed to the claimant, Abram H. Johnson, one of his executors, certain farming tools and other personal property of the value of about sixty-five dollars, with the following provision: "The foregoing bequests to be in full compensation for any and all care said Johnson may render me in my old age." After the will was probated and said Johnson qualified as such executor, he accepted and received all the property so bequeathed to him, as appears by the inventory and account verified and filed; and other evidence. *Held*, that such claimant is estopped from making claim for care and services rendered to testator in sickness in his old age. *Matter of Strong*529

EVIDENCE—

To make an endorsement of principal or interest upon a note admissible at all, it must appear to have been made by a creditor at a time when he had no motive to give a false credit, and, at least, before the statute of limitations had created a bar. But where it satisfactorily appears that an endorsement was made at a time when it would be against the interest of the party making it, it will furnish evidence, for the consideration of the trial court, of payment according to its terms. *Matter of Hearman*.....37

To prove payment of interest at the time an endorsement purported to be made, in order to take the claim on a note out of the statute, a witness stated that he worked for the claimant that year, and at no other time; that deceased came to claimant's house and stated that

he wanted to pay that interest; that claimant replied, "that's right," and that they both went into an adjoining room. *Held*, that the facts and circumstances stated warranted the conclusion as matter of fact that the interest was, in fact, paid at that time and that the endorsement was made at the time it bears date. *Id.*.....37

A witness, who is an executor, is not an interested party within meaning of Code Civ. Pro. 829, in proceedings to probate a will. *Matter of Gagan*231

An attorney who draws, and is a subscribing witness to, a will, may testify as to its preparation and execution under amendment to Code Civ. Pro. sec. 836 of 1892, which was declaratory of the law as it then stood. *Id.*..... 231

Although an executor is not a competent witness in the first instance, to testify to transactions between himself and his decedent as to a partial payment upon a joint note of decedent and the executor, yet, having been examined, and contestant having proved by him sufficient to establish his individual liability, *held*, that the executor might testify as to the entire transaction so as to relieve himself of such liability. *Matter of Beach*..... 246

All acts or declarations, forming part of the act or transaction to be proved so as to explain or qualify it, are admissible when such transaction or act forms the fact in issue or is deemed relevant thereto. *Matter of Wheeler*550

EXECUTION—

The surrogate cannot permit executions to issue on judgments against an executor (Code Civ. Pro. sec. 1825) when the assets are small, and the claims, several of which are in litigation, large, as he cannot to a measurably certain extent ascertain and determine the debts and claims against the estate, and the sums for the recovery of which an execution should be permitted to issue (Code Civ. Pro. sec. 1826), and when, in any event, the small amount of assets was necessary to meet the considerable expenses attending the litigation of the claims. *Matter of Hesdra* 359

Real property directed by the will to be sold for the purpose of administering the estate, is real property within the meaning of section 1823, Code Civ. Pro., providing that "Real property which belonged to a decedent is not bound * * * by a judgment against his executor * * * and is not liable to be sold by virtue of an execution issued on such a judgment, unless the judgment is expressly made by its terms a lien upon specific real property therein described, or expressly directs the sale thereof," and does not become equitably converted into personal property so as to enable the surrogate to grant leave to issue execution on judgments against the executor under Code Civ. Pro. secs. 1825-6, which only authorize execution against personal property. *Id.* 359

An order will not be made for leave to issue execution upon a judg-

ment obtained against an administrator for a debt due by decedent, under Code Civ. Pro. sec. 1825, providing that an execution shall not issue against an administrator in his representative capacity unless an order permitting it to issue has been made by the surrogate from whose court the letters issued, which order shall specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum, when it appears that the administrator fully accounted for all the assets which came to his hands, and there was no property of the estate in his hands, more especially when Code Civ. Pro. sec. 2552, provides that an order permitting such an execution to issue is, except upon appeal therefrom, conclusive evidence that the administrator has sufficient assets to pay the amount of the execution. *Matter of Hathaway* 447

In such case it is not essential, in an action brought by the petitioning creditor to set aside fraudulent conveyances of property made by the decedent, that the complaint should allege the issuing of execution upon the judgment against the administrator, nor is the fact that the execution has not issued a bar to the action, but if otherwise, some other authority should be given the surrogate to permit the execution to issue. *Id.*..... 447

Even if the court could issue such an order under the circumstances, facts should be presented which would enable the court to make an order specifying the amount that should be paid upon the judgment, or the *pro rata* share to which the petitioner would be entitled. *Id.* 447

An application for leave to issue an execution upon a transcribed justice's judgment, may be made before the expiration of three years after the issuing of letters of administration. *Matter of Phelps*...541

The better practice, in such case, is to apply first to the County Court, in which all questions concerning the validity of the judgment can be tested. *Id.*..... 541

EXECUTION OF WILL—

A will will be admitted to probate when the testator sent for the subscribing witnesses to come to his house to witness the execution, and he was explicit in his declaration that it was his will, and in his request to them to sign as witnesses, and one of the witnesses was explicit in testifying testator signed the will in their presence, although the other witness had no definite recollection, but had an impression it was not signed by testator in their presence, and that he did not observe his signature—ten years having elapsed from its execution and the latter witness having written the date of the will immediately preceding the signature of the testator, thereby allowing the assumption that so important an omission as the absence of testator's signature would have attracted his attention. *Matter of Boardman* 77

When there was a doubt as to whether testator executed a codicil

to his will in substantial compliance with the statute, and both witnesses testified that testator said the paper he produced was a codicil to his will and asked them to subscribe as witnesses, which they did in his presence, *held*, that as an examination of the instrument showed that the signatures were all written with the same ink, and apparently at the same time, the codicil should be admitted to probate. *Id.*....77

A will signed by a cross-mark cannot be admitted to probate where only one witness, who did not see the mark made, is produced, the other having died, unless other evidence is produced showing that the deceased actually made the mark. *Matter of Porter*.....129

On an application for the probate of a certified copy of a will and codicil of a decedent who died resident in Pennsylvania, in which State the will and codicil had been proved, it appeared that the attestation clause did not state the witnesses signed at the request of the testator, and that the laws of Pennsylvania did not require proof of such request, which was essential under the statute of this State. The surviving witness, however, testified that the testator presented the will to him with his name already signed to it, and requested him to be a witness thereto, and that he signed it accordingly, but he could not recollect whether the other witnesses were present. The handwriting of the testator and of the other subscribing witnesses were proved. *Held*, that the will was sufficiently established. *Matter of Klett*...477

When a testator presents a paper to a witness with his name already signed to it, and declares it to be his will, it is tantamount to an acknowledgment of his signature. *Id.*.....477

The New York statute does not require that the witnesses should sign in the presence of each other. *Id.*..... 477

In such case the only surviving witness (a lawyer) to the codicil could not swear positively that he saw the deceased sign it, or that the deceased declared the paper to be a codicil to his will, but he testified he prepared the codicil at decedent's bedside and at his dictation, and that he believed the attestation clause, which stated that he "published" the paper as such, to be true. He also testified that the other witnesses either signed at the request of the deceased, or at his (the lawyer's) request with testator's consent. The handwriting of testator and of the deceased witness was proved by another witness. *Held*, that the requirements of the statute were complied with. *Id.*....477

When a codicil says, "I, Frederick Klett, the within named testator," and correctly refers to the date of the will, thus allowing the inference to be drawn that it was endorsed upon or appended to the will—*held*, that the proving of the codicil proves the will. *Id.*.....477

One of the witnesses to a will testified he did not remember seeing testatrix sign the paper or make her mark, and another witness swore positively he did not. Their evidence did not disclose that either of them was in the room when the mark was made, but the third witness (the attorney who drew the will) testified that the whole business of

the preparation, execution and witnessing of the paper was done at the same interview, including the signing by the deceased and the three witnesses. The other witnesses testified that neither of them saw the attorney sign as a witness. *Held*, that the proof was not satisfactory of the subscription by the testatrix in the presence of two witnesses, and probate should be refused. Matter of Nevins.....486

A will may be proved by evidence other than the testimony of the subscribing witness. Matter of Johnson.....579

EXECUTORS AND ADMINISTRATORS—

Where an executor commingles the avails of the estate with his own funds and uses them for his personal benefit, he is chargeable with interest. Matter of Crosby 28

Where it appears that subsequent to the making of a will the relations existing between the testator and the persons named as executors became changed so as to warrant a conclusion that they would not have been selected as executors at a subsequent date, and that the testator had an intention of changing them, the rule that they occupy that position by reason of the personal confidence and trust of the testator in them fails, and the court may consider their pecuniary circumstances and qualifications; and where it appears that the estate is large, and the executors have little or no pecuniary means, and their business habits and experience have not qualified them for the management of important pecuniary responsibilities, may require security for the faithful performance of their duties. Matter of O'Brien.....41

It having been provided by articles of copartnership that on the death of one of two partners, the surviving partner might agree with the representative of the decedent as to the continuation or sale of the business, *held*, that as, on the death of one of the partners, the only executor who qualified was the surviving partner, and as he could not therefore agree with himself as to the matters mentioned in the articles, he should, pending an appeal by himself as to the amount due to the estate by the firm, give bond, under Code Civ. Pro. section 2687, subd. 3, for the funds (representing decedent's interest in the firm) retained by him as executor, the testator's widow and one of the petitioners having consented to such retention pending the convenient winding up of the business. Matter of Leavitt..... 74

Where an executor has proceeded in good faith, his claim for reimbursement for an expenditure of sixty dollars for funeral expenses should not be denied on the ground that such expenditure was unwarranted. Matter of Proctor 89

Where the testator delivered to his executor certain notes with directions to collect the same and use the proceeds in paying his funeral expenses and for a monument, such notes do not form a part of the assets of the estate and are not subject to the rights of the widow.

Id. 89

On the judicial settlement of the accounts of an executor or administrator he may prove any debt due to him from the decedent, but not one due to himself and others. *Matter of Jones*.....99

An affidavit in support of a claim by an administrator which does not state that no payments have been made thereon is insufficient. *Matter of Clapsaddle*111

Where a legatee dies before the legacy is payable, and no administrator has been appointed for him, the case is not one within sections 2747 or 2748 of the Code, and the court, on the accounting of the executors of the estate, will direct such legacy to be paid into court, to be delivered ultimately to any one who can establish a legal right to its possession. *Matter of Morgan*123

In 1882 decedent gave a note for \$1,000, payable in one year, and died in 1887. Letters of administration were granted December 19, 1887, and the claim upon the note was presented and allowed, and a payment made thereon on the final accounting in 1890, the personalty being insufficient to pay the debts. In a proceeding for distribution of a surplus arising from a foreclosure sale of the realty, *held*, that the claim was barred by the statute of limitations. (*Church v. Olendorf*, 49 Hun, 440, 19 St. Rep. 700, followed.) *Matter of Burdick*.....134

The provision of chapter 406, Laws 1889, directing appraisers to set apart additional personal property to the widow in case her interest in the real estate of the decedent in addition to her dower right and personalty to the amount of \$150 is of less value than \$1,000, is not limited to a case where the decedent leaves real estate. A case where the interest of the widow in the real estate of her deceased husband is nothing because of want of value and a case where her interest is nothing for want of real estate are both cases within the meaning of the act. *Matter of Mulligan*141

Chapter 406, Laws 1889, is not unconstitutional as impairing the obligation of contracts made prior to its passage. *Id.*.....141

By the will of testator the executors were directed to hold certain bank stock owned by him. Upon the settlement of the estate the executors were directed to retain the stock in two banks, as trustees, and pay the income to testator's daughter for life and the stock on her death to her issue; if none, to certain of testator's children. One of the banks failed, and an assessment was made on the stockholders for the amount of the stock. *Held*, that the legatees interested under the will took their interest subject to all the necessary incidents, including the possibility of such assessment, and that the trustees should sell the other bank stock to pay said assessment and distribute the balance among those entitled under the will. *Matter of Bull*.....168

On the judicial settlement of his accounts, an executor cannot obtain a decree directing a residuary legatee to whom the executor has knowingly paid the entire residue, to refund the amount of his expenses, and a debt due him, and his commissions, and costs of accounting, but must seek for relief elsewhere. *Lang v. Howell*..... 243

Decedent's estate is liable for the balance due on a joint note of decedent and the executor, when it appeared the decedent gave the proceeds to the executor, his son, to buy a team, and intended to pay it himself, and that money paid and indorsed on the note was furnished by decedent. *Matter of Beach*.....246

If an executor employs another to transact for him the usual and ordinary duties of his trust, the expense of such cannot be charged to the estate. *Id.*..... 246

An executor is liable for loss on a resale of personal property, when, although the purchaser obtained the goods, he did not pay cash, or give a note as required by the terms of sale, and was allowed by the executor, who took a mortgage on the articles sold, to secure a debt due to himself, to retain possession of the property for seven months. *Id.* 246

When it appeared that although an intestate had two deposits in banks in his own name, the same represented the earnings of decedent and of his brother, the administrator, and as the evidence disclosed that they both worked for about the same period of time at the same wages, *held*, that the administrator having drawn the entire moneys, was liable to account for one-half thereof, and also *held*, that as to a third deposit in the joint names of intestate and the administrator, as it appeared that this sum also represented the joint earnings of the brothers, the administrator should likewise charge himself with one moiety thereof. *Matter of Lent*.....254

A universal devisee and legatee under a will, who after the resignation of the executor, became administrator with the will annexed, cannot, until decedent's debts are paid, retain the proceeds of a fire policy upon a house and barn upon the real estate devised to him, on the ground that on the renewal of such policy held by decedent he had instructed the insurance agent to have such proceeds made payable to himself personally, and not to decedent's estate. Such proceeds could only belong to him when decedent's debts and legacies were paid. *Matter of O'Connell*..... 267

An executor sold certain lots to persons who did not complete their purchase, as the same were bought in behalf of the executor, his sister or the testator's widow. The nominal purchasers assigned their bids without consideration to the sister, who, after receiving a conveyance thereof from the executor, conveyed same at the executor's request to the widow. *Held*, that although no person acting in a fiduciary capacity can deal with the trust estate to his personal gain or benefit, yet as the sale was not unqualifiedly repudiated by the contestant, the executor would be held to the sale; but even though the right of repudiation existed, *quære* whether the court, under the circumstances, could afford practical relief. *Matter of Smith*.....271

On such sale to the widow, the executor cannot be allowed the value of the widow's dower, as a payment to the widow, as the sale made by

him must be presumed to have been made subject to the right of dower, and, if not, the executor was not authorized to purchase her dower, and, on the other hand, if she had no dower, the payment was without consideration. *Id.*..... 271

When an invalid claim is presented to an administrator, and he, although doubting its validity, yet willing to have it in some manner made binding upon the estate, agreed to refer it, but neglected to employ counsel to protect the estate before the referee, neglected to oppose the confirmation of the report allowing the claim, failed to appeal from the judgment thereon, or adopt any other measures to relieve the estate therefrom, he is guilty of such negligence as to render him liable personally, and contestants will not be driven to the expedient of moving to set the judgment aside. *Matter of Saunders* 336

Existence of an alleged claim due to an administrator must be established by legal evidence. Mere presentation thereof with an affidavit of verification is not sufficient. *Id.*.....336

When an account filed and verified by an administrator claiming a debt due to himself, concedes payments to substantially the full amount of the claim as established, such payments will be set off as against the amount so established, and will not be applied upon that portion of the account which the executor fails to establish. *Id.*...336

An executor, who is an attorney, will not be allowed compensation for appearing on his own account, and on behalf of others interested, in an action brought to determine conflicting claims to a residuary share, other than the commissions allowed executors by law. *Matter of Howard* 346

The surrogate cannot permit executions to issue on judgments against an executor (Code Civ. Pro. sec. 1825) when the assets are small, and the claims, several of which are in litigation, large, as he cannot to a measurably certain extent ascertain and determine the debts and claims against the estate, and the sums for the recovery of which an execution should be permitted to issue (Code Civ. Pro. sec. 1826), and when, in any event, the small amount of assets was necessary to meet the considerable expenses attending the litigation of the claims. *Matter of Hesdra*.....359

Real property directed by the will to be sold for the purpose of administering the estate, is real property within the meaning of section 1823, Code Civ. Pro., providing that "Real property which belonged to a decedent is not bound * * * by a judgment against his executor * * * and is not liable to be sold by virtue of an execution issued on such a judgment, unless the judgment is expressly made by its terms a lien upon specific real property therein described, or expressly directs the sale thereof," and does not become equitably converted into personal property so as to enable the surrogate to grant leave to issue execution on judgments against the executor under Code Civ. Pro. secs. 1825-6, which only authorize execution against personal property.

Id. 359

To entitle an executor to credit for payments for which he produces no vouchers, he must give competent evidence of such payment "other than his own oath." Code Civ. Pro. sec. 2734. Matter of Gerow...364

An executor cannot deduct a sum in excess of his legal commissions, nor can he retain same until judicially allowed. Id.....364

An executrix prior to her death placed certain of the funds of the estate in the hands of one who was, after her death, appointed executor. *Held*, that in respect thereto the latter could not be treated as an executor *de son tort* (2 R. S. 81, sec. 60). and that the estate of the executrix was liable to any profits earned by the funds so placed, prior to her death. Matter of Richardson.....384

An executor is not obliged to charge himself with the amounts of insurance policies still running, nor with interest on a fund held by a trust company in liquidation, nor with collaterals to loans out of the estate made to himself, as they are not cash in hand or its equivalent, but he should set them forth as outstanding, in schedule G.

Id. 384

An executor is chargeable with profits from the use of money belonging to the estate, as also any bonus he may have received for the loan of the funds, and if such should be less than the legal rate of interest, he is chargeable with the deficiency. Id.....384

An executor and trustee is liable for dealings with the estate prior to his appointment up to the time when he assumed control of the funds. Id..... 384

A credit for commissions will be disallowed, as they cannot be taken prior to accounting. Id..... 384

An executor should keep his own accounts when they are simple, and he will not be allowed for bookkeeper's charges, especially when any complexity arose by his own unwarranted dealings with the funds.

Id. 384

On an application by an alleged creditor of a decedent whose will was probated in a foreign State, and the executors of which were appointed ancillary administrators here, to have the penalty of their bond increased so as to cover her indebtedness, the court cannot try the question of the alleged indebtedness, although disputed. Matter of Govan 387

Ancillary administrators having been appointed and duly qualifying (Code Civ. Pro. sec. 2667) by giving bond in \$120, being double the amount of a debt (\$60) alleged by them to be due by decedent to a resident in New York, the assets in this State being also alleged to be under \$100 in value, *held*, that the application of an alleged creditor to the extent of \$240 to have the bond increased to \$600 penalty should be denied, as the only object of the bond was to secure the creditors to the extent of the value of the assets. Id.....387

An administrator will not be allowed to deduct from the amount of the inventoried estate, on his accounting, the value of the chattels

belonging to a milk business, on the ground that the same belonged to him, and not to the estate, when it appeared that decedent (administrator's father) bought the milk route and property necessary to carry it on, and that the expenses of the sale of the property were charged to and paid out of the estate moneys by the administrator, and that it was upon a farm belonging to decedent and through the milk business that the father and son, by mutual family relations, without any definite fixing of rights, provided a livelihood and home for themselves. *Matter of Ver Valen*.....435

Such administrator is chargeable with the proceeds of the sale of the "good will" of such milk business. *Id.*..... 435

An administrator cannot make profit out of the estate by purchasing articles at an auction sale of chattels of the estate and reselling them at a profit, and on his accounting will be chargeable with the profits so made. *Id.*.....435

An order will not be made for leave to issue execution upon a judgment obtained against an administrator for a debt due by decedent, under Code Civ. Pro. sec. 1825, providing that an execution shall not issue against an administrator in his representative capacity unless an order permitting it to issue has been made by the surrogate from whose court the letters issued, which order shall specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum, when it appears that the administrator fully accounted for all the assets which came to his hands, and there was no property of the estate in his hands, more especially when Code Civ. Pro. sec. 2552 provides that an order permitting such an execution to issue is, except upon appeal therefrom, conclusive evidence that the administrator has sufficient assets to pay the amount of the execution. *Matter of Hathaway* 447

In such case it is not essential, in an action brought by the petitioning creditor to set aside fraudulent conveyances of property made by the decedent, that the complaint should allege the issuing of execution upon the judgment against the administrator, nor is the fact that the execution has not issued a bar to the action, but if otherwise, some other authority should be given the surrogate to permit the execution to issue. *Id.*..... 447

Even if the court could issue such an order under the circumstances, facts should be presented which would enable the court to make an order specifying the amount that should be paid upon the judgment, or the *pro rata* share to which the petitioner would be entitled.

Id. 447

Surrogates' Courts have power under Code Civ. Pro. sec. 2472 (providing that such courts may, upon an executor's accounting, construe the provisions of a will whenever necessary to make the decree as to distribution), to determine as to the validity of an antenuptial agreement made by decedent and his intended wife, made in contemplation

of death, whose subject matter is the distribution of his property after his death. *Matter of Jones*..... 454

A decree will be reopened for the purpose of determining the question of the executor's liability to the estate for a deduction obtained on the payment of a note due by deceased, the benefit of which deduction was not given to the estate and information of which did not come to the applicant's knowledge till after the former trial. *Matter of Beach* 460

When it is alleged that under the decision of the court on the former hearing the widow was entitled to interest on the personalty from the testator's death, and that the decree deprived her of such interest between the testator's death and the date of the decree, the latter will be opened for the purpose of correcting such error, if it exists. *Id.*....469

An alleged erroneous construction of a will is not a "sufficient cause" for a rehearing and to open a decree within the meaning of Code Civ. Pro. sec. 2481, subd. 6, providing that a decree may be opened for fraud, newly discovered evidence, clerical error, or "other sufficient cause," as the latter words mean causes of like nature with those specifically named. *Id.*..... 469

A surviving administrator is not liable to account for the assets of the estate when nearly the entire thereof fell into the hands of his co-administrator, deceased, whether they were originally taken by the latter or handed to him by the surviving administrator. *Matter of Van Wert* 473

The statute of limitations may be invoked as a protection by an accounting administrator, notwithstanding that he has voluntarily accounted. *Id.*..... 473

Interest received on securities other than such as was accruing at intestate's death, is not a portion of the assets so as to affect the running of the statute of limitations. *Id.*.....473

In such case payments by the administrator to his co-administrator, who was also next of kin, within the statutory period, will not take the case out of the statute. *Id.*.....473

On accounting, a surviving administrator is not obliged to produce vouchers for moneys handed to his co-administrator, as such, as they are not payments, and vouchers are only required for payments made of debts or shares or other liabilities. *Id.*.....473

An administrator who is an attorney will not be allowed his costs and charges in actions in which he was concerned as attorney. *Id.*..473

An administrator will not be allowed for moneys paid to his counsel for services requiring no legal skill, and which the administrator himself might have performed. *Matter of Van Nostrand*.....495

In such case a payment (*inter alia*) to counsel for the administrator for attending at an auction sale will be disallowed as to so much thereof as might be over and above what might be allowed a clerk if it were essential that a clerk should be employed. *Id.*..... 495

By the third clause of his will the testator bequeathed to claim-

ant, Abram H. Johnson, one of his executors, certain farming tools and other personal property of the value of about sixty-five dollars, with the following provision: "The foregoing bequests to be in full compensation for any and all care said Johnson may render me in my old age." After the will was probated and said Johnson qualified as such executor, he accepted and received all the property so bequeathed to him, as appears by the inventory and account verified and filed, and other evidence. *Held*, that such claimant is estopped from making claim for care and services rendered to testator in sickness in his old age. *Matter of Strong*.....529

The surrogate, upon an accounting by the personal representative of a deceased executor, may determine the validity of a claim of such deceased executor against the estate of testator. *Matter of Cooper*...563

In case of an equitable conversion of realty, where the estate is held by the executors unconverted, they are not entitled to commissions on the principal. *Matter of McLaren*.....585

The value of the real estate, in such case, may be considered in determining the commissions to which they are entitled on the income.

Id. 585

FUNERAL EXPENSES—

Where an executor has proceeded in good faith, his claim for reimbursement for an expenditure of sixty dollars for funeral expenses should not be denied on the ground that such expenditure was unwarranted. *Matter of Proctor*..... 89

GIFTS CAUSA MORTIS—

Testator, who had no wife or children, held a note of the executor, who was an intimate friend. During his last illness he asked his niece to bring his papers, and gave her this note, telling her that he had given it to Crosby; that he knew of it, that she was to keep it, and that he did not want his heirs to know anything about it. *Held*, that this constituted a valid gift *cause mortis* of the note to the executor, and that there was a sufficient delivery. *Matter of Crosby*.....28

The executor received said note subject to the collateral inheritance tax. *Id.*..... 28

GIFTS INTER VIVOS—

On application by a legatee to compel payment of a legacy of \$200, the executor objected that petitioner had not paid three notes of \$100 each, which testatrix had indorsed for petitioner and paid. Petitioner alleged that testatrix had given her the notes. It appeared that testatrix paid and took up the notes, and then, while boarding with petitioner, made her will, bequeathing petitioner the legacy of \$200, telling petitioner that she had cancelled the notes, and on its being suggested that petitioner witness her will, decedent stated that petitioner could not be a witness, as she might lose her legacy. It was also in evidence that testatrix requested a lady friend to deliver decedent's papers to

latter's uncle after her death, and that among the papers so delivered were the notes in question, which were uncanceled. *Held*, that there was no actual or constructive delivery of the notes so as to make a perfect gift of them to petitioner. *Matter of Lyons*.....411

Where the intention of the guardian to make certain gifts to his ward has been fully consummated by a complete delivery, he cannot upon his accounting be credited for them as for moneys expended for the benefit of the ward. *Matter of Beirne*.....578

GUARDIAN AND WARD—

The fact that the estate or fund has been diminished by unavoidable losses or payments of claims, furnishes no ground for reducing the penalty of the bond given by a general guardian, even though the guardian is obliged to compensate the surety in proportion to the amount of the bond. *Matter of Patterson*..... 3

The mere fact that a guardian in a foreign country had several years before possession of property of his wards, is not of itself sufficient to establish a claim in favor of the wards against the guardians' estate in a proceeding taken by creditors to sell real estate for the payment of debts. Before such a claim can be established, either the property or the proceeds thereof must be traced to the specific property sought to be sold, or else the liability of the guardian must be fixed by an accounting had in some court having jurisdiction. *Matter of Will* 95

Where it clearly appeared from the evidence that the ward, both before and after her majority, had a knowledge of the state of her guardian's accounts sufficient to show her that the entire trust fund had been expended, and she did not begin the proceeding till ten years after attaining her majority, the statute of limitations applies. *Quære*, whether even without such evidence the rule that as between trustee and *cestui que trust* no statute of limitations, nor any bar by analogy to the statute, can be operative, is applicable. *Matter of Barker* 480

Where the intention of the guardian to make certain gifts to his ward has been fully consummated by a complete delivery, he cannot upon his accounting be credited for them as for moneys expended for the benefit of the ward. *Matter of Beirne*.....578

Testator by his will gave his wife \$1,000, and the balance of his estate to his brother. He and his wife had an account in bank in their joint names in which each deposited, having independent sources of revenue, and the larger portion of the drafts upon it was made by the wife. Shortly after his death she drew out the balance. *Held*, that there being no proof as to how much belonged to each, the presumption was that each owned half; that the wife held as trustee any part of such balance as belonged to the estate; that the court had no power to direct her to pay the same over, but would direct that the same be charged against her statutory allowance, the legacy having been paid,

and that the executors pay the same to the brother. *Matter of Tobin* 5

INFANTS—

The Surrogate's Court has no power to settle and determine disputed claims against an infant's estate for moneys and services alleged to have been expended and rendered in the care of the infant's property. *Matter of Stoechr* 172

INTEREST—

Where an executor commingles the avails of the estate with his own funds and uses them for his personal benefit, he is chargeable with interest. *Matter of Crosby* 28

An administrator will be charged with the value of the use of personal property, consisting of farming stock and implements of husbandry, of which he had the avails between decedent's death and the sale thereof. *Matter of Saunders*..... 336

An administrator will be charged with interest on moneys of the estate which he might have invested, after allowing him a reasonable length of time (six months) in which to invest it. *Id.*..... 336

An administrator is entitled to interest upon a claim due to himself, although he received funds sufficient to defray same, as he is without authority to retain his own debt till allowed to him by the surrogate upon his accounting. *Id.*..... 336

JOINT DEPOSITS—

When it appeared that although an intestate had two deposits in banks in his own name, the same represented the earnings of decedent and of his brother, the administrator, and as the evidence disclosed that they both worked for about the same period of time at the same wages, *held*, that the administrator having drawn the entire moneys, was liable to account for one-half thereof, and also *held*, that as to a third deposit in the joint names of intestate and the administrator, as it appeared that this sum also represented the joint earnings of the brothers, the administrator should likewise charge himself with one moiety thereof. *Matter of Lent* 254

JUDGMENT—

James Matteson recovered a judgment against the decedent before a justice of the peace of Chautauqua County, which was docketed in the county clerk's office on transcript filed July 3, 1878, and such judgment thereupon became a lien on land of decedent, who died intestate December 13, 1884, leaving no personal property to pay the judgment. The judgment creditor petitioned the Surrogate's Court for leave to issue execution and sell the lands. Opposed by Hiram Putnam, subsequent

mortgagee of same lands, claiming the judgment outlawed, and the lien thereof extinguished by lapse of time. Letters of administration were issued upon the estate of decedent September 13, 1888, and the administrator was duly discharged January 4, 1890. *Held*, that although the judgment was outlawed, and more than ten years had elapsed after docketing thereof, yet in this case, under section 1380 of the Code, the lien thereof was continued three years and six months from issuing letters of administration; that the meaning of the word "*thereafter*," as used in the third sentence of said section, relates back to the issuing of letters of administration and not to *date* of decedent's death. Matter of Gates..... 47

JURISDICTION—

The Surrogate's Court has not jurisdiction to give judicial construction to wills on petition for letters of administration with will annexed in place of deceased executrix; but the question may be properly decided on judicial settlement of the accounts of such administrator, when appointed. Matter of Smith..... 31

In a proceeding by a legatee to compel payment of a legacy, there must be a petition, citation and answer under Code Civ. Pro., sections 2717 and 2718, and proof under subd. 2, section 2718 that there is sufficient personal property to pay the legacy, otherwise the surrogate does not acquire jurisdiction. Matter of Lyons.....411

A motion to dismiss a petition for payment of a legacy bequeathed to the executor in trust for petitioner will be denied when the written answer filed in pursuance of Code Civ. Pro. section 2805 does not contain a specific denial of the validity of the claim, and an affirmative allegation of facts showing the doubtful nature of the claim, as required by that section, but merely presents an issue as to the manner in which the trust is being executed, as to which the surrogate has jurisdiction under Code Civ. Pro. sec. 2472, subd. 3. Matter of Riley 439

Surrogates' Courts have power under Code Civ. Pro. sec. 2472 (providing that such courts may, upon an executor's accounting, construe the provisions of a will whenever necessary to make the decree as to distribution), to determine as to the validity of an antenuptial agreement made by decedent and his intended wife, made in contemplation of death, whose subject matter is the distribution of his property after his death. Matter of Jones.....454

KNOWLEDGE OF CONTENTS OF WILL—

Where the deceased was a man of prudence and care, and all the requirements of the statute as to the execution of wills was complied with, it is not to be presumed that he signed or affixed his mark and made a declaration as to what the instrument was without knowledge of its contents, and the court cannot require, on account of his lack

of education, that it must be made to appear that the instrument was read to him. *Matter of Smith*..... 146

When the execution of a will has been proved, the presumption is raised that testatrix knew its contents. *Matter of Hall*..... 516

In such case, however, if there is evidence of fraud and undue influence, affirmative proof of knowledge by testatrix of the contents becomes necessary. *Id.*..... 516

When the evidence shows that five days before the execution of her will the testatrix heard it read to her, and that at the time of execution she declared in the presence of witnesses that she knew its contents, and that at the time of such execution she was of sound mind—*held*, that this constituted affirmative proof that testatrix had knowledge of the contents of the will. *Id.*..... 516

LEGACY—

Where a legatee dies before the legacy is payable, and no administrator has been appointed for him, the case is not one within sections 2747 or 2748 of the Code, and the court, on the accounting of the executors of the estate, will direct such legacy to be paid into court, to be delivered ultimately to any one who can establish a legal right to its possession. *Matter of Morgan*..... 123

A legacy of \$1,000 to Thaddeus J. Boyd provided he will in the future write his name T. Jackson Boyd, "but if he refuses so to do I only give him \$500, and the balance, \$500, to revert back to my residuary estate," is not void for uncertainty, but is valid, and is vested, subject to be defeated by a breach of the condition. *Matter of Jackson* 241

A condition in a will that "Should any person or society be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld," is so broad and sweeping that it could not be enforced, for it could not be ascertained whether it has been violated, and a legatee who files objections to probate of the will, for insufficiency of execution, and also as to the validity of a number of its provisions, does not thereby forfeit his legacy. *Id.*.....241

A bequest of residuary real and personal estate to executors, "to be expended by them for benevolent and charitable purposes, as they, or the survivor of them, shall, in their or his good judgment, deem wise and best for the promotion of Christianity and the welfare of mankind in the world," is void, there being no certain designated beneficiary.

Id. 241

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in which the trust is being executed, as to which the surrogate has jurisdiction under Code Civ. Pro. sec. 2472, subd. 3. *Matter of Riley* 439

A testator bequeathed to his brother \$1,000 in lieu of all claims of his brother against his estate, and appointed his son trustee of the bequest "to use it for the comfortable support of my said brother, and to pay his funeral expenses," and if any part should remain after the decease of his brother, to divide same amongst testator's sons and daughters. *Held*, that the will neither expressly nor impliedly conferred upon the trustee any authority over petitioner's person, and that he could not compel the latter to reside with him, nor dictate as to where he should reside. *Id.*.....439

The petitioner was entitled to demand and receive from the trustee such portion of the legacy as was necessary for his support, without regard to the question of his ability to support himself. *Id.*.....439

As the will did not authorize the trustee to determine the amount to be paid for the support of the beneficiary, and did not authorize the beneficiary himself to determine the amount, such amount should be fixed by the court. *Id.*.....439

By section 9 of Laws of 1847, chapter 133 (general act as to rural cemeteries), it is provided that an association thereunder incorporated may take and hold property for (*inter alia*) improving the cemetery lots according to the terms of the grant, devise or bequest. *Held*, that the Oak Hill Cemetery of Nyack, whether incorporated thereunder or under the special act, Laws 1865, chapter 139, relating to Oak Hill Cemetery, Rockland County, might take and hold a legacy upon trust to apply the income for the perpetual care of a lot therein, as section 8 of latter act conferred upon said cemetery the powers contained in the general act. *Matter of Schuler*.....490

A bequest to a cemetery corporation upon trust to apply the income for the perpetual care of a lot does not violate the statute against perpetuities, when the act under which it is incorporated authorizes it to hold funds for such a purpose. *Id.*.....490

LIBEL—

A will should not be permitted to be made a vehicle for libel or contumely, and when such design plainly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record. *Matter of T. B.*.....35

LIENS—

James Matteson recovered a judgment against the decedent before a justice of the peace of Chautauqua County, which was docketed in the county clerk's office on transcript filed July 3, 1878, and such judgment thereupon became a lien on land of decedent, who died intestate December 13, 1884, leaving no personal property to pay the judgment. The judgment creditor petitioned the Surrogate's Court for leave to issue

execution and sell the lands. Opposed by Hiram Putnam, subsequent mortgagee of same lands, claiming the judgment outlawed, and the lien thereof extinguished by lapse of time. Letters of administration were issued upon the estate of decedent September 13, 1888, and the administrator was duly discharged January 4, 1890. *Held*, that although the judgment was outlawed, and more than ten years had elapsed after docketing thereof, yet in this case, under section 1380 of the Code, the lien thereof was continued three years and six months from issuing letters of administration; that the meaning of the word "*thereafter*," as used in the third sentence of said section, relates back to the issuing of letters of administration and not to *date* of decedent's death. Matter of Gates..... 47

If, by agreement between tenants in common, the common property is used for the purpose of making a profit, either tenant in common may have an accounting in equity of the rents and profits and disbursements, and the tenant to whom there is found a balance due will have an equitable lien upon and right to reimbursement out of the share of the common property from which such balance is found due. Matter of Lucy117

The owners of a farm agreed that one of them should carry on a dairy and general farming business thereon, the products to be divided between them in a certain manner. The business was so carried on until the death of the one conducting it, who received the moneys from sales and mingled the same with his other money, and the other tenant received nothing. The estate proved insolvent. *Held*, that the co-tenant was entitled to be paid in full for his share of the profits out of the moneys so received, and, if necessary, out of the proceeds of any property owned by the parties in common and used in the business, and that only so much as remained after such payment should be considered assets for the payment of general creditors. Id.....117

LIMITATION OF ACTIONS—

To make an endorsement of principal or interest upon a note admissible at all, it must appear to have been made by a creditor at a time when he had no motive to give a false credit, and, at least, before the statute of limitations had created a bar. But where it satisfactorily appears that an endorsement was made at a time when it would be against the interest of the party making it, it will furnish evidence, for the consideration of the trial court, of payment according to its terms. Matter of Hearman..... 37

To prove payment of interest at the time an endorsement purported to be made, in order to take the claim on a note out of the statute, a witness stated that he worked for the claimant that year, and at no other time; that deceased came to claimant's house and stated that he wanted to pay that interest; that claimant replied, "that's right," and that they both went into an adjoining room. *Held*, that the facts

and circumstances stated warranted the conclusion as matter of fact that the interest was, in fact, paid at that time, and that the endorsement was made at the time it bears date. *Id.*..... 37

A payment, in order to have the effect of a renewal of the obligation or an extension of the time in which an action may be brought, must be made by the party who is sought to be held; not necessarily in person, but by him or by his agent authorized to do that act for him, so that it is his payment. *Matter of Sanders*.....105

It was claimed that a delivery of hay by P. was a payment by decedent on the note. The evidence showed that on the payee sending for hay, decedent said that P. was away, and that when he returned the payee could have it; that subsequently on examining the note he expressed surprise that the hay was not indorsed thereon, and the payee replied that she and P. were in the habit of letting their accounts run and indorsing them in one indorsement. P. testified that all the hay delivered was his property. *Held*, that a payment by decedent or by P., as his agent, was not shown. *Id.*.....105

The only indorsement within the statutory time upon a note of decedent to his wife was one for \$50, on back interest, which was not signed by him. His daughter testified that she was present when the indorsement was made, and that decedent said: "There, the note is all right now; my indorsement makes it all right;" that no money passed at the time; that she had seen her father hand her mother money at other times, but could not tell the amount. *Held*, insufficient to prove a payment, and that the note was barred by the statute. *Matter of Clapsaddle*111

In 1882 decedent gave a note for \$1,000, payable in one year, and died in 1887. Letters of administration were granted December 19, 1887, and the claim upon the note was presented and allowed, and a payment made thereon on the final accounting in 1890, the personalty being insufficient to pay the debts. In a proceeding for distribution of a surplus arising from a foreclosure sale of the realty, *held*, that the claim was barred by the statute of limitations. (*Church v. Olendorf*, 49 Hun, 440, 19 St. Rep. 700, followed.) *Matter of Burdick*.....134

Including in the inventory a note or claim against the executor, without other comment or memoranda, is such an acknowledgment as to take it out of the statute of limitations. *Matter of Daggett*....156

Where it clearly appeared from the evidence that a ward, both before and after her majority, had a knowledge of the state of her guardian's accounts sufficient to show her that the entire trust fund had been expended, and she did not begin the proceeding till ten years after attaining her majority, the statute of limitations applies. *Quære*, whether even without such evidence the rule that as between trustee and *cestui que trust* no statute of limitations, nor any bar by analogy to the statute, can be operative, is applicable. *Matter of Barker* 480

MONUMENT, PROVISION AS TO—

A will directed that after payment of debts the balance and remainder of the estate, real and personal, should be expended in the building of a monument and a suitable fence and fixtures. *Held*, that this was no more than a direction to the executors to set apart a reasonable portion of the estate, suitable to testator's station in life, for that purpose. *Matter of Boardman*..... 77

As the estate amounted to \$8,000, the rights of creditors were not interfered with, the executor had consulted with several of the legatees, and no one objected to the expenditure but the widow, and the monument was nearly ready for delivery, *held*, that although the cost of the monument (\$400) reached a limit held to be unreasonable, it would be allowed to the executor under the circumstances. *Matter of Beach*, 248

An expense of \$300 for a tombstone will be allowed when the estate amounts to much over \$6,000, the rights of creditors are not impaired, and the residuary legatees are collateral relatives only. *Matter of Howard* 346

NOTES—

Note as to what is a due execution of a will under 2 Rev. Stat. sec. 40, and Code Civ. Pro. sec. 2620..... 80

Note as to law of domicile.....226

Note as to alterations in wills.....331

Note as to expenditures for tombstones, headstones and monuments 355

Note on ademption of legacies.....402

Note as to revocation of wills.....598

PARENTAL RELATION—

One who has been brought up by testator from childhood and treated as one of the family, although not adopted by him, is one to whom he stood in the relation of a parent within the meaning of the statute. *Matter of Wheeler*..... 160

The deceased was a co-tenant of certain property with her sister, the mother of petitioners, and resided thereon with her sister's family until her sister's death, without any agreement as to board or payment of rent. After the sister's death she continued to reside there in the same manner. After their father's death the petitioners continued to work the farm in the same manner as formerly and deceased continued to reside with them until her death. *Held*, that this was not sufficient to constitute the relation of parent and child between them so as to justify an exemption from tax upon the property received by them from her. *Matter of Sweetland*200

When an assessment was not made on legacies to legatees who stood in the relation of adopted children to testatrix for more than ten years prior to her death, and which would have been liable to duty under the original act of 1885, ch. 483, the tax having accrued prior to the

amendment of ch. 713 of 1887, exempting such legacies from taxation—*held*, that under section 25 of the act as amended by Laws 1889, ch. 479, the legatees were entitled to the benefit of the amendment of 1887, and this right was not affected by Laws of 1892, ch. 399, sec. 23, repealing the act of 1889, as the saving clause of the act of 1892 preserved prior rights. *Matter of Thomas*.....464

PAYMENT—

A payment, in order to have the effect of a renewal of the obligation or an extension of the time in which an action may be brought, must be made by the party who is sought to be held; not necessarily in person, but by him or by his agent authorized to do that act for him, so that it is his payment. *Matter of Sanders*.....105

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When the delivery of money is from husband to wife or from father to child, the presumption that the delivery of money was in payment of a debt will not arise. *Id.*.....111

POWERS OF CORPORATIONS—

The corporate powers of the Trustees of the New York Annual Conference of the Methodist Episcopal Church do not include the right to act as trustees of property given them by will and pay over as thereby directed the income to the pastor of St. Paul's Church as one of the class of ministers mentioned in the statutes of incorporation (Laws 1843, ch. 131; Laws 1887, ch. 379), which provided that the trustees might take by devise or purchase, and that they should take charge of all property belonging to the New York Annual Conference, so far as the latter might direct, and appropriate same for the benefit of the itinerant, supernumerary and superannuated preachers and widows and orphans of deceased preachers in such manner as the Conference might

direct, as the capacity to take a devise meant a legal devise, not a devise void under the statute of perpetuities, and there was no provision for the trustees to hold funds for the building of a parsonage as directed, in a certain event, by the will. *Matter of Williams*...414

PRACTICE—

Personal service of a citation on non-residents within the State thirty days before the return day is insufficient. *Matter of Porter*...94

An irregularity in the decision of a surrogate by reason of its failure to state separately the facts found and conclusions of law is waived by a failure of the aggrieved party to take an appeal and avail himself of his rights under section 2545 of the Code. *Matter of Hesdra* 103

Motion to vacate a decree on the ground of a failure to file findings of facts and conclusions of law cannot be made after the expiration of one year. *Id.*.....103

A certificate of authority of the officer taking the acknowledgment of satisfaction of a surrogate's decree in another State, which states that such officer "was duly authorized to take the same," is not sufficient; but such certificate should specify that such officer was one authorized by the laws of that State to take the acknowledgment of deeds. *Matter of Wilcox* 182

Although section 780, Code Civil Procedure, providing for shortening the time for notice of motion to less than eight days, by an order to show cause, is not directly made applicable to the Surrogate's Court, the practice is well settled that the Surrogate's Court may employ an order to show cause to shorten time of notice. *Matter of Filley*...234

An application for leave to issue an execution upon a transcribed justice's judgment, may be made before the expiration of three years after the issuing of letters of administration. *Matter of Phelps*...541

The better practice, in such case, is to apply first to the County Court, in which all questions concerning the validity of the judgment can be tested. *Id.*..... 541

Under Supreme Court Rule 32, a surrogate may permit service of a case and exceptions after expiration of the time therefor. *Matter of Williams* 574

PRESUMPTIONS—

When the delivery of money is from husband to wife or from father to child, the presumption that the delivery of money was in payment of a debt will not arise. *Matter of Clapsaddle*.....111

PRINCIPAL AND SURETY—

A note made by the decedent and one P. was given to the aunt of the latter to raise money to pay off a prior note made by P. and indorsed by decedent. All the payments on such note were made by P., who made all the indorsements. Decedent at one time asked to be

allowed to take his name off, which the payee refused, but expressed no surprise, and decedent said that he would see that it was paid, and that P. had made enough on the place to have paid it. *Held*, sufficient to show that the payee understood that decedent was only a surety. Matter of Sanders105

PROBATE—

A will should not be permitted to be made a vehicle for libel or contumely, and when such design plainly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record. Matter of T. B. 34

Personal service of a citation on non-residents within the State thirty days before the return day is insufficient.. Matter of Porter.....94

Two instruments, complete in form, upon a four page blank, were offered for probate. One disposed of money and specific articles, and the other of specific articles alone. They were drawn by testatrix, and were the same in all respects except as to the legacies, and were not dated. The subscribing witness testified that one was executed some months before the other, but she had only an impression as to which was executed first. It appeared that after one was executed testatrix received property from her sister which consisted wholly of household furniture. *Held*, that as the will bequeathing articles alone was not a complete disposition of testatrix's property, it must be deemed the last one executed and the clause of the revocation ignored under the circumstances, and that the will disposing of money should be admitted as the will of testatrix and the other as a codicil. Matter of Purdy 194

REFEREE—

An addendum to the report of a referee, made subsequent to its submission, will be disregarded. Matter of Richardson.....384

The surrogate has power to direct and enforce the payment of referee's fees in his court out of the funds of the estate. Matter of Ellis 547

REVIVAL OF REVOKED WILL—

A will which has been formally revoked, but not destroyed, can be revived by the execution of a codicil to it without a re-execution of the will. The intermediate will is thereby revoked. Matter of Knapp 167

REVOCATION OF PROBATE—

In a proceeding to set aside a decree, admitting a will to probate, on the ground of undue influence, contestant insisted that from the fact of the administration of morphine to decedent by his nephew, a physician, to alleviate the pain of inflammatory rheumatism, decedent's mind had become so impaired that it could be more easily controlled,

and that the nephew had administered the drug for the purpose of unduly influencing decedent in the making of his will, *held*, that as it appeared that decedent was a man of robust frame, strong constitution, temperate in habit and of splendid business attainments, and of perfectly sound mind, and that he had not taken any great portion of morphine up to the time of the execution of the will, and such as he had taken was properly administered for the sole purpose of alleviating extreme pain, no such inference could be drawn from the evidence as alleged by contestant. *Matter of Lowman*.....259

It was further insisted by contestants that for a long time prior to the execution of the will, testator's nephew, the physician, had charge of the business affairs of decedent, who deferred to his nephew's opinion and judgment in the management of some of his affairs, and that there was therefore an opportunity for the nephew to unduly influence decedent in the making of his will. *Held*, that undue influence is a fact which must be proven; it cannot be guessed at. The burden of proving that fact was upon the contestants, and unless they established to the satisfaction of the court not only that the opportunity existed, but that it was followed by coercion or fraud, they could not sustain their position. That as there was no evidence that the nephew or any other person than decedent's legal adviser talked with decedent about the making of any will, or the disposition of his property, either prior to or at the execution of his will; that the witnesses to the will positively testified that decedent did not appear to be under the influence of any person, that the disposition of decedent's property was dictated by the excellent judgment which had characterized all the acts of his life, and that there was no evidence that decedent was unduly influenced by any one between the time of the execution of his will and of his death, the will in all respects conformed to the requirements of law. *Id.*.....259

When the evidence shows that a proceeding to revoke probate of a will was not brought in good faith, the contestants should be subjected to costs. *Id.*..... 259

A petition by an heir and next of kin not cited on the probate, praying that the probate be revoked, will be denied, as the decree is binding on those cited, but the decree will be opened to allow petitioner to file allegations against the validity of the will. *Matter of Odell*...408

When the estate consists of realty and personalty, the court has no ground for the exercise of discretion in reopening the decree as to the personalty, as the next of kin is absolutely entitled to an order opening the decree. *Id.*..... 408

The expression "sufficient cause" in subd. 6, section 2481, Code Civ. Pro., relates only to the granting of a new trial, or a new hearing for fraud, etc., and not to the opening of a decree. *Id.*.....408

Even if otherwise, it is "sufficient cause" for reopening a decree when petitioner was not cited on the probate of the will. *Id.*.....408

REVOCATION OF WILL—

When it appears that a will offered for probate was revoked by a second will, the mere fact that the testator destroyed the subsequent will, without more, does not revive the former will, as it is provided by the Revised Statutes that the destruction, cancellation or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive the first will, or unless, after such destruction, cancelling or revocation, the testator shall duly republish his first will (3 Rev. St. [Birdseye's Ed.] p. 3345, sec. 53). Matter of Forbes.....590

SALE OF REAL ESTATE—

The mere fact that a guardian in a foreign country had several years before possession of property of his wards, is not of itself sufficient to establish a claim in favor of the wards against the guardian's estate in a proceeding taken by creditors to sell real estate for the payment of debts. Before such a claim can be established, either the property or the proceeds thereof must be traced to the specific property sought to be sold, or else the liability of the guardian must be fixed by an accounting had in some court having jurisdiction. Matter of Will 95

A petition for sale of real estate to pay debts alleged a large indebtedness of decedent to petitioner, that the only personal property realized by petitioner, as administrator, was \$10, and that he had proceeded with reasonable diligence in converting the personal property of decedent into money and applying same to the payment of debts, *held*, that although the petition, as required by section 2752, subd. 4, Code Civ. Pro., did not explicitly state what application had been made of the personal property which came to petitioner's hands, or the amount which might yet be realized therefrom, yet, as the petitioner was the only debtor, and as he could not make payment upon his own claim till it was established, the petition in fact disclosed that the petitioner had made the only legitimate application of the moneys which had come to his hands (*viz.*, to hold same until his claim had been established), and that the amount which might yet be realized therefrom to apply upon his claim when established, was the sum of \$10. Matter of Williams..... 284

In such a case, the administrator has proceeded with reasonable diligence in converting the personal estate into money, and applying it in the payment of debts and funeral expenses, within the meaning of Code Civ. Pro. sec. 2759, subd. 5, although he did not actually apply the \$10 towards the payment of debts. *Id.*.....284

In a proceeding for the sale of real estate to pay debts, the court has jurisdiction to determine the validity of any claim, although disputed, even though it be that of the administrator. *Id.*.....284

SATISFACTION—

The satisfaction of a decree of a Surrogate's Court directing the payment of money is regulated by section 2553 of the Code. Matter of Wilcox182

STATUTE AGAINST PERPETUITIES—

A testator left his personalty to the Trustees of the New York Annual Conference of the Methodist Episcopal Church, upon trust to apply the interest annually as salary of the pastor of St. Paul's Methodist Episcopal Church at Athens, Greene County, New York, provided that if the said St. Paul's Church should erect a parsonage for its pastor it might draw upon said Trustees for the amount necessary therefor, and provided further that if the last mentioned church should become extinct, the Trustees should turn over the trust funds to the Board of Church Extension of the Methodist Episcopal Church. *Held*, that as there was no limitation upon the suspension of the absolute ownership of testator's personal property, except at the termination of the corporate existence of St. Paul's Methodist Episcopal Church, and as there was no limitation of the time for the erection of the parsonage, the will was contrary to 1 Rev. St. p. 773, sec. 1, providing that the absolute ownership of personal property should not be suspended for a longer period than two lives in being at testator's death, even although (having reference to the first provision) the Methodist Church at Athens had, before testator died, purchased a parsonage which was not free from debt, as it was the nature, not the execution of the power that determined its validity. Matter of Williams 414

A bequest to a cemetery corporation upon trust to apply the income for the perpetual care of a lot does not violate the statute against perpetuities, when the act under which it is incorporated authorizes it to hold funds for such a purpose. Matter of Schuler.....490

STATUTES—

Chapter 406, Laws 1889, is not unconstitutional as impairing the obligation of contracts made prior to its passage. Matter of Mulligan 141

Amendment of 1892 to Code Civ. Pro. sec. 836, enabling an attorney who draws a will and is also a subscribing witness thereto, to testify as to its preparation and execution, is not, although retrospective, unconstitutional, as interfering with vested rights, as the statute under which the right, if any, was claimed was repealed by the amendment. Matter of Gagan231

SURETYSHIP—

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who made all the indorsements. Decedent at one time asked to be allowed to take his name off, which the payee refused. but expressed no surprise, and decedent said that he would see that it was paid, and that P. had made enough on the place to have paid it. *Held*, sufficient to show that the payee understood that decedent was only a surety. Matter of Sanders 105

SURROGATES' COURTS—

The Surrogate's Court has not jurisdiction to give judicial construction to wills on petition for letters of administration with will annexed in place of deceased executrix; but the question may be properly decided on judicial settlement of the accounts of such administrator, when appointed. Matter of Smith..... 31

An irregularity in the decision of a surrogate by reason of its failure to state separately the facts found and conclusions of law is waived by a failure of the aggrieved party to take an appeal and avail himself of his rights under section 2545 of the Code. Matter of Hesdra...103

Motion to vacate the degree on the ground of a failure to file findings of facts and conclusions of law cannot be made after the expiration of one year. *Id*..... 103

The Surrogate's Court has no power to settle and determine disputed claims against an infant's estate for moneys and services alleged to have been expended and rendered in the care of the infant's property. Matter of Stoehr 172

The satisfaction of a decree of a Surrogate's Court directing the payment of money is regulated by section 2553 of the Code. Matter of Wilcox 182

Although section 780, Code Civil Procedure, providing for shortening the time for notice of motion to less than eight days, by an order to show cause, is not directly made applicable to the Surrogate's Court, the practice is well settled that the Surrogate's Court may employ an order to show cause to shorten time of notice. Filley's Estate...234

The surrogate has no authority to extent, as a matter of favor, the time of an executor to file his bond under Code Civ. Pro. sec. 2687, beyond the five days therein provided, yet he may, under Code Civ. Pro. ssec. 724, 2538, relieve a party from an order taken against him when he can show it occurred through a mistake, inadvertence, or excusable negligence, and the same relief may be obtained under Code Civ. Pro. sec. 2481, subd. 6, for fraud, newly discovered evidence, clerical error, or other sufficient cause. *Id*..... 234

A decree having been made, under Code Civ. Pro. sec. 2687, requiring an executor to give bond within five days. it will not be reopened under Code Civ. Pro. sec. 2481, subd. 6, on the ground of the alleged newly discovered evidence that real estate which the executor on the application for the bond. alleged to be of less value than stated. and in respect of which he subsequently furnished proof that it was. upon the assumption that it belonged to testator at the time of his death. of a certain value. had been really conveyed by the decedent to the executor, who

conveyed it to another, when such facts were obviously known to the executor at the time of the application. *Id.*.....234

The court may require a bond from an executor covering property alleged to have been fraudulently conveyed by his decedent. *Id.*....234

In a proceeding by a legatee to compel payment of a legacy, there must be a petition, citation and answer under Code Civ. Pro. sections 2717 and 2718, and proof under subd. 2, section 2718, that there is sufficient personal property to pay the legacy, otherwise the surrogate does not acquire jurisdiction. *Matter of Lyons*.....411

An alleged erroneous construction of a will is not a "sufficient cause" for a rehearing and to open a decree within the meaning of Code Civ. Pro. sec. 2481, subd. 6, providing that a decree may be opened for fraud, newly discovered evidence, clerical error, or "other sufficient cause," as the latter word means causes of like nature with those specifically named. *Matter of Beach*.....469

A decree will be reopened for the purpose of determining the question of the executor's liability to the estate for a deduction obtained on the payment of a note due by deceased, the benefit of which deduction was not given to the estate and information of which did not come to the applicant's knowledge till after the former trial. *Id.*..469

When it is alleged that under the decision of the court on the former hearing the widow was entitled to interest on the personalty from the testator's death, and that the decree deprived her of such interest between the testator's death and the date of the decree, the latter will be opened for the purpose of correcting such error, if it exists.

Id. 469

The surrogate has power to direct and enforce the payment of referee's fees in his court out of the funds of the estate. *Matter of Ellis* 547

TESTAMENTARY CAPACITY—

Where it appears that a testator was not influenced in any way in the drawing of his will, and fully understood the fact of the existence of his wife and children and others who were the objects of his bounty, and the extent of his estate, the mere fact that he gave his children but an inconsiderable portion is not sufficient to show want of testamentary capacity. *Matter of Finn*..... 92

Incapacity to make a will cannot be inferred, alone, from advanced years, poor health or a weak mind. *Matter of Otis*.....126

When both witnesses to a will, one the family physician of many years standing, and the other an old neighbor and intimate acquaintance of decedent, who nursed him in his last illness, testify that decedent was of sound mind at the time he made his will, and the circumstances attending the execution of the will confirm such conclusions, *held*, that testator at the time of making his will was fully competent to do so, although of advanced age, and in his last illness, and some of the contestant heirs-at-law and next of kin took very little, and

others nothing, under the will. *Matter of Carver*.....316

Although a testatrix was just beginning to betray evidence of senility from the fact that her memory was impaired, and that she would fail to recognize acquaintances or call them by wrong names, and there was also evidence of eccentricities and peculiarities in her actions and conduct, *held*, that as she remembered all her immediate relatives, all of whom were mentioned in the will, and as the aggregate of the legacies showed she had a clear comprehension of the amount of her estate, and that no one but herself gave the particulars for the provisions thereof to the attorney who prepared the will, she had sufficient testamentary capacity, although the case was a marginal one.

Matter of Mabie503

If when testatrix executed her will, she fully comprehended the business she was about to transact, and had in view the nature and extent of her possessions, and knew those who had claims upon her bounty, and acted of her own free will, it is immaterial that about eight days previously she had recovered from a stupor which the doctor pronounced coma, and which had lasted a few days. *Matter of Hall*..516

No presumption of want of testamentary capacity arises from old age alone, nor from enfeebled condition of body or mind. *Matter of Wheeler* 550

A mind partially clouded by drink may execute a valid will. *Matter of Johnson*579

The fact that the testator had an epileptic fit does not raise a presumption of disability after he has recovered from the attack. *Id.*..579

TRUSTEES—

An executor, who is directed by the will to sell his testator's real estate, invest the proceeds, pay the interest of one moiety semi-annually to testator's daughter for life, and upon her death, leaving issue, divide the principal equally amongst the children on their attaining 21, being a testamentary trustee, whose duties as such are separable from his duties as executor (Code Civ. Pro. sec. 2514, subd. 6), is liable to account for the proceeds of sales made by him, in the Surrogate's Court (Code Civ. Pro. secs. 2802-11). *Matter of Valentine* 310

On such an accounting, the court has only power to charge the trustee with any proceeds of sale he has omitted to charge himself with, and (Code Civ. Pro. sec. 2811) decree payment and distribution. He cannot inquire into the validity of any sales of real estate made by the executor, by reason of fraud and the like. *Id.*.....310

TRUSTS—

A valid active trust to continue during the lives of beneficiaries named cannot be extinguished by the union in the same person of the right to the income for life and the right to the principal after the death of the beneficiary, viz.: where the beneficiary has purchased the

interest of the remainderman. *Matter of Shepherd et al.*.....174

Delivery of money to a person, to be applied to specific purposes, to which he assents, creates a valid trust. *Matter of Cooper*.....563

Testator, by his will, made a complete division of his property. By a codicil he gave to his wife and two daughters certain real and personal property in trust to continue his business for three years from his death, or, in their discretion, for five years. He gave authority to use part of the trust fund to pay the specific legacies, gave instructions as to the management of the business, and for distribution at the termination of the trust, and then authorized his wife "to collect all my interest money and rentals of my property during her lifetime, or until the estate is finally settled, and apply the same to her own use." The personal estate not embraced in the trust was insufficient to pay the legacies. *Held*, that the last provision of the codicil referred to the income and rentals of the trust estate, and did not authorize the widow to take the interest and rentals of the estate not placed in trust. *Matter of Snyder*.....185

The trust attempted to be created by the codicil was void, because limited by a period of years, and not upon lives. *Id.*.....185

UNCERTAINTY OF BENEFICIARY—

A bequest to "the heirs of" a deceased daughter is not void for uncertainty as to the beneficiary. *Matter of Boardman*.....77

UNDUE INFLUENCE—

While the fact of fraud or undue influence cannot be proved by the declarations, prior or subsequent, of the testator, such declarations are admissible when they denote the mental status or mental fact in issue. *Matter of Green* 52

A change of testamentary intention, however sudden, which results in giving the inheritance to the heir, is not even ground for suspicion when the change follows a reconciliation after estrangement; especially when the reconciliation is stripped of sinister appearance, even, by reason of the first advances proceeding from the testator. *Id.*.....52

Undue influence, when relied upon to annul a testamentary provision, must be proved; it cannot be presumed. It need not necessarily be proved by direct evidence, but, if not, then such circumstances must be proved from which that conclusion logically and irresistibly follows. *Matter of Otis* 126

In a proceeding to set aside a decree, admitting a will to probate, on the ground of undue influence, contestant insisted that from the fact of the administration of morphine to decedent by his nephew, a physician, to alleviate the pain of inflammatory rheumatism, decedent's mind had become so impaired that it could be more easily controlled and that the nephew had administered the drug for the purpose of unduly influencing decedent in the making of his will, *held*, that as it appeared that decedent was a man of robust frame, strong constitution,

temperate in habit and of splendid business attainments, and of perfectly sound mind. and that decedent had not taken any great portion of morphine up to the time of the execution of the will. and such as he had taken was properly administered for the sole purpose of alleviating extreme pain, no such inference could be drawn from the evidence as alleged by contestant. *Lowman's Estate*.....259

It was further insisted by contestants that for a long time prior to the execution of the will, testator's nephew, the physician, had charge of the business affairs of decedent, who deferred to his nephew's opinion and judgment in the management of some of his affairs, and that there was therefoer an opportunity for the nephew to unduly influence decedent in the making of his will. *Held*, that undue influence is a fact which must be proven; it cannot be guessed at. The burden of proving that fact was upon the contestants, and unless they established to the satisfaction of the court not only that the opportunity existed, but that it was followed by coercion or fraud, they could not sustain their position. That as there was no evidence that the nephew or any other person than decedent's legal adviser talked with decedent about the making of any will, or the disposition of his property, either prior to or at the execution of his will; that the witnesses to the will positively testified that decedent did not appear to be under the influence of any person, that the disposition of decedent's property was dictated by the excellent judgment which had characterized all the acts of his life, and that there was no evidence that decedent was unduly iinfluenced by any one between the time of the execution of his will and of his death, the will in all respects conformed to the requirements of law. *Id*..... 259

Proponent, a lawyer, who, although a relative of decedent was not an heir or next of kin, and who had transacted some legal business for decedent, drew his will and was the principal beneficiary thereunder. *Held*, that the burden thereby thrown upon proponent of showing that the will correctly represented decedent's wishes was met by the fact that for more than a year previously the testator had the general scheme of the will, as drawn, in mind; that the drawing of the will originated with testator, and not with proponent, who merely, testator being dangerously ill, acted as scrivener when requested to do so by testator; that testator had previously consulted with his wife, and that testator was surrounded by friends during the entire time of the visit of proponent, so that latter had not the opportunity to unduly influence testator. *Matter of Carver*.....316

Testatrix made her will at the age of 80, leaving legacies to her brothers and sisters, amounting to about one-third of her estate, and bequeathing the residue to her nephew and niece, with whom she had then resided about two months, and with whom she continued to reside till her death, about five years subsequently. She had at one time declared her intention to leave her property equally between her brothers and sisters. There was no direct evidence of restraint or

undue influence, nor could same be inferred from the evidence. The nephew and niece testified they knew nothing of the will having been made or of its contents till some time after testatrix's death. *Held*, that undue influence was not established. *Matter of Mabie*.....503

Where it has been once proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is upon the party who alleges it. *Matter of Wheeler*....550

Where the alleged testator is quite old and somewhat weakened, by reason of age and infirmities, both in body and mind, the burden is shifted upon the party in whose interest an important change in the will is made. *Id.*.....550

The presumption, which the law raises under such circumstances, is one of fact and not of law, and may be repelled. *Id.*.....550

The act of a party addicted to intemperance, in disposing of his property, will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, through kind offices springing from attachment or affection. *Matter of Johnson*.....579

WAIVER—

Including in the inventory a note or claim against the executor, without other comment or memoranda, is such an acknowledgment as to take it out of the statute of limitations. *Matter of Daggett*....156

WIDOW—

Where the personal property is not sufficient to make up the amount required so that the widow may receive a full \$1,000, the proceeds of real property converted by sale under the will cannot be considered as personal property under the statute and used to make up the deficiency. In such case, however, she takes all the personal property free from any charge for debts or expenses of administration. *Matter of Col-lard* 1

Where the testator delivered to his executor certain notes with directions to collect the same and use the proceeds in paying his funeral expenses and for a monument, such notes do not form a part of the assets of the estate, and are not subject to the rights of the widow. *Matter of Proctor*89

The provisions of chapter 406, Laws 1889, directing appraisers to set apart additional personal property to the widow in case her interest in the real estate of the decedent in addition to her dower right and personalty to the amount of \$150 is of less value than \$1,000, is not limited to a case where the decedent leaves real estate. A case where the interest of the widow in the real estate of her deceased husband is nothing for want of value and a case where her interest is nothing for want of real estate are both within the meaning of the act. *Mat-ter of Mu'lligan* 141

A testator directed that "all rents and interest moneys be paid by his executors to his wife," out of which she should pay all taxes and assessments, the balance, or so much thereof as might be necessary for

the purpose, to be used by her in support of herself and family, and after bequeathing his household furniture to his wife, he devised and bequeathed the residue of his estate to his children to be paid to them, in equal shares, as they arrived at the age of 21. *Held*, that as dower is favored, and there were no express words, or a demonstration upon the face of the will of the intention of the testator, that the widow should not take both dower and the provision made for her, the widow was entitled to dower, in addition to what was given to her by the will. Matter of Smith 271

WILL—

Where a testator has that mental and physical vigor which is essential to make a valid will, it is not the law that the draughtsman of a will, even if he holds confidential relations to the testator, cannot be his executor or take a legacy thereunder, nor can fraud be presumed where the will contains such provisions, nor evidence be required to show that it was made freely, without fraud or undue influence. Matter of Sheldon 10

A mere agency to transact business in relation to investments in another State, where the principal takes little or no part in its management, does not create business relations of that confidential character from which will ordinarily arise any legal presumption of undue influence in the making and execution of a will drawn by the agent and containing a legacy to himself. *Id.*..... 10

On probate of a will, it need not be shown that the testator gave directions for making it, or that it was read to or by him. Knowledge of its contents will be presumed from his having signed it, and his declaration that it is his will. *Id.*..... 10

Testatrix, who had no ancestors or descendants surviving, by her will, gave to certain nephews and nieces, with whom she had little communication, legacies of \$500 and over, and the balance of her estate to a nephew who drew her will, his adopted son and grand-nephews and grand-nieces, children of a niece, share and share alike. *Held*, that the inequality of the legacies did not show undue influence, and that the will should be admitted to probate *Id.*..... 10

While the fact of fraud or undue influence cannot be proved by the declarations, prior or subsequent, of the testator, such declarations are admissible when they denote the mental status or mental fact in issue. Matter of Green 52

A change of testamentary intention, however sudden, which results in giving the inheritance to the heir, is not even ground for suspicion when the change follows a reconciliation after estrangement,; especially when the reconciliation is stripped of sinister appearance, even, by reason of the first advance proceeding from the testator. *Id.*.....52

Testator, after making a will giving his property to his wife and issue, executed a deed of trust by which he transferred his property in trust for the support and maintenance of himself and family and on his death to distribute it according to the provisions of the will. *Held*,

that the legatees took by virtue of the will and not the deed, and that the law in force at the death of testator should govern, and such death having taken place subsequent to the passage of the act of 1891, the interests of the wife and children were taxable. *Matter of Johnson* 68

A will will be admitted to probate when the testator sent for the subscribing witnesses to come to his house to witness the execution, and he was explicit in his declarations that it was his will, and in his request to them to sign as witnesses, and one of the witnesses was explicit in testifying testator signed the will in their presence, although the other witness had no definite recollection, but had an impression it was not signed by the testator in their presence, and that he did not observe his signature—ten years having elapsed from its execution and the latter witness having written the date of the will immediately preceding the signature of the testator, thereby allowing the assumption that so important an omission as the absence of testator's signature would have attracted his attention. *Matter of Boardman* 77

When there was a doubt as to whether testator executed a codicil to his will in substantial compliance with the statute, and both witnesses testified that testator said the paper he produced was a codicil to his will and asked them to subscribe as witnesses, which they did in his presence, *held*, that as an examination of the instrument showed that the signatures were all written with the same ink, and apparently at the same time, the codicil should be admitted to probate. *Id.*...77

The will in question directed that after payment of debts the balance and remainder of the estate, real and personal, should be expended in the building of a monument and a suitable fence and fixtures. *Held*, that this was no more than a direction to his executors to set apart a reasonable portion of the estate, suitable to testator's station in life, for that purpose. *Id.*..... 77

Where it appears that the testator was not influenced in any way in the drawing of his will, and fully understood the fact of the existence of his wife and children and others who were the objects of his bounty, and the extent of his estate, the mere fact that he gave his children but an inconsiderable portion is not sufficient to show want of testamentary capacity. *Matter of Finn*..... 92

A mistake of testator as to the person nominated as executor will not render the will void. *Id.*..... 92

Incapacity to make a will cannot be inferred, alone, from advanced years, poor health or a weak mind. *Matter of Otis*.....126

Undue influence, when relied upon to annul a testamentary provision, must be proved; it cannot be presumed. It need not necessarily be proved by direct evidence, but, if not, then such circumstances must be proved from which that conclusion logically and irresistibly follows.

Id. 126

A will signed by a cross-mark cannot be admitted to probate where only one witness, who did not see the mark made, is produced, the

other having died, unless other evidence is produced showing that the deceased actually made the mark. *Matter of Porter*.....129

By testator's will he gave his property to his wife "to have full control of all my real and personal estate during her natural life or so long as she may remain my widow, but if she should remarry her control and interest in my property is to cease and shall pass to the heirs hereinafter named," and provided that "in the event of any of the above named heirs previous to the death or remarriage of my wife, their share of my estate shall be inherited by those remaining whose names appear above, and in no event shall my daughter, Mary Sohn, have any portion or share in my personal or real property." *Held*, that testator did not die intestate as to any portion of his property; that the legal effect of the will was to give an estate for life to the widow, liable to be terminated by her marriage, and that upon her death or remarriage the property passes absolutely to the heirs named, subject to the contingency specified in the will. *Matter of Sohn*...131

Where the deceased was a man of prudence and care, and all the requirements of the statute as to the execution of wills were complied with, it is not to be presumed that he signed or affixed his mark and made a declaration as to what the instrument was without knowledge of its contents, and the court cannot require, on account of his lack of education, that it must be made to appear that the instrument was read to him. *Matter of Smith*.....146

To constitute a delusion, there must be a belief in the existence as a fact of something which does not exist; and such belief must be without basis for its support, springing up without cause in the imagination of the person entertaining it, and become so firmly implanted in the mind as to withstand such evidence and argument as would convince reasonable persons of its falsity. *Id.*.....146

When decedent's son was seven years old, decedent came home intoxicated and told his wife he had been told that said son was not his child, and repeated the story at different times for thirty years, but only when intoxicated. Some years before his death he told the priest the same thing, and in his will disinherited said son. *Held*, that decedent was not the subject of a delusion which would invalidate a will. *Id.*..... 146

A will which has been formally revoked, but not destroyed, can be revived by the execution of a codicil to it without a re-execution of the will. The intermediate will is thereby revoked. *Matter of Knapp*, 167

By the will of testator the executors were directed to hold certain bank stock owned by him. Upon the settlement of the estate the executors were directed to retain the stock in two banks, as trustees, and pay the income to testator's daughter for life and the stock on her death to her issue; if none, to certain of testator's children. One of the banks failed, and an assessment was made on the stockholders for the amount of the stock. *Held*, that the legatees interested under the will took their interest subject to all the necessary incidents including

the possibility of such assessment, and that the trustees should sell the other bank stock to pay said assessment and distribute the balance among those entitled under the will. Matter of Bull.....168

The daughter died without issue, and, in the meantime, certain of testator's children had also died. *Held*, that the interest of such as died lapsed with their death, and the fund should be distributed among the survivors. Id..... 168

Testator, by his will, made a complete division of his property. By a codicil he gave to his wife and two daughters certain real and personal property in trust to continue his business for three years from his death, or, in their discretion, for five years. He gave authority to use part of the trust fund to pay the specific legacies, gave instructions as to the management of the business, and for distribution at the termination of the trust. and then authorized his wife "to collect all my interest money and rentals of my property during her lifetime, or until the estate is finally settled, and apply the same to her own use." The personal estate not embraced in the trust was insufficient to pay the legacies. *Held*, that the last provision of the codicil referred to the income and rentals of the trust estate, and did not authorize the widow to take the interest and rentals of the estate not placed in trust. Matter of Snyder 185

The trust attempted to be created by the codicil was void, because limited for a period of years, and not upon lives. Id.....185

Two instruments, complete in form, upon a four-page blank, were offered for probate. One disposed of money and specific articles, and the other of specific articles alone. They were drawn by testatrix, and were the same in all respects except as to the legacies, and were not dated. The subscribing witness testified that one was executed some months before the other. but she had only an impression as to which was executed first. It appeared that after one was executed testatrix received property from her sister which consisted wholly of household furniture. *Held*, that as the will bequeathing articles alone was not a complete disposition of testatrix's property, it must be deemed the last one executed, and the clause of the revocation ignored under the circumstances, and that the will disposing of money should be admitted as the will of testatrix and the other as a codicil. Matter of Purdy194

An interlineation, erasure or other alteration made in a will, either by the testator or by a stranger, after due execution of the instrument, without a new attestation, does not avoid the instrument, but the court may disregard the same and probate the will according to its original language, when that can be ascertained. Matter of Wilcix.....204

A legacy of \$1,000 to Thaddeus J. Boyd provided he will in the future write his name T. Jackson Boyd, "but if he refuses so to do I only give him \$500, and the balance, \$500 to revert back to my residuary estate." is not void for uncertainty, but is valid, and is vested, subject to be defeated by a breach of the condition. Matter of Jackson 241

A condition in a will that "should any person or society be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld," is so broad and sweeping that it could not be enforced, for it could not be ascertained whether it has been violated, and a legatee who files objections to probate of the will, for insufficiency of execution, and also as to the validity of a number of its provisions, does not thereby forfeit his legacy. *Id.*..... 241

Testator gave and bequeathed to his wife "all of my personal property that I shall be possessed of at the time of my death, and all of my household goods, and the use of my real estate during her natural life. * * * (2) To my daughter M. the organ that is now at my house; after the death of my wife, I give (3) to my son B. the sum of \$500; (4) to my son W. the sum of \$500." *Held*, that the widow took but a life estate in the personal property, excluding the organ. *Matter of Beach* 246

As in such will the gifts of the personal estate to the wife and the organ to the daughter were irreconcilable, the daughter took the organ immediately and absolutely. *Id.*..... 246

The words "after the death of my wife" should be read in connection with each of the following bequests, and therefore the two \$500 legacies because payable after the death of the widow. *Id.*..... 246

A testator directed that "all rents and interest moneys be paid by his executors to his wife," out of which she should pay all taxes and assessments, the balance, or so much thereof as might be necessary for the purpose, to be used by her in support of herself and family, and after bequeathing his household furniture to his wife, he devised and bequeathed the residue of his estate to his children to be paid to them, in equal shares, as they arrived at the age of 21. *Held*, that as dower is favored, and there were no express words, or a demonstration upon the face of the will of the intention of the testator, that the widow should not take both dower and the provision made for her, the widow was entitled to dower, in addition to what was given to her by the will. *Matter of Smith* 271

Where alterations appear on the face of a testamentary disposition of property, such alterations are presumed to have been made after execution, rendering it necessary for those seeking to establish a will containing such apparent defects to overcome such presumption by proof, direct or inferential. This is an exception to the general rule as to other instruments, which provides that such alterations, in the absence of proof to the contrary, are presumed to have been made before the execution of the writing in which they appear. *Matter of Carver* 316

Although as a general rule a material alteration in written documents, made after execution, for fraudulent purposes, vitiates the entire instrument, the effect of an unauthorized and unauthenticated alteration in a will, made after execution, is to render the change inoperative, leaving the will to stand in form and effect as before

such alteration was attempted. *Id.*.....316

A testator bequeathed to his wife \$400 annually out of his personal estate, also all his household furniture, goods, books, pictures, organ, clothing, etc., to be accepted in lieu of dower. It was claimed that the words "to be accepted in lieu of dower" were fraudulently inserted after execution. *Held*, that as the words "clothing, etc., to be accepted in lieu of dower" were written upon and constituted one entire line in regular order, and were not crowded, and the only person to be prejudiced by such words, viz., the widow, urged probate of the will as it stood, and the family physician, who had witnessed the will, and carefully examined it at the time of execution, testified he observed no alteration therein, the words in question were not inserted after execution, although the letters in such words were somewhat heavier and of a darker shade than most of the other parts of the will, but not of particular portions thereof. *Id.*.....316

When both witnesses to a will, one the family physician of many years standing, and the other an old neighbor and intimate acquaintance of decedent, who nursed him in his last illness, testify that decedent was of sound mind at the time he made his will, and the circumstances attending the execution of the will confirm such conclusions, *held*, that testator at the time of making his will was fully competent to do so, although of advanced age, and in his last illness, and some of the contestant heirs-at-law and next of kin took very little, and others nothing, under the will. *Id.*.....316

Proponent, a lawyer, who, although a relative of decedent was not an heir or next of kin, and who had transacted some legal business for decedent, drew his will and was the principal beneficiary thereunder. *Held*, that the burden thereby thrown upon proponent of showing that the will correctly represented decedent's wishes was met by the fact that for more than a year previously the testator had the general scheme of the will, as drawn, in mind; that the drawing of the will originated with testator, and not with proponent, who merely, testator being dangerously ill, acted as scrivener when requested to do so by testator; that testator had previously consulted with his wife, and that testator was surrounded by friends during the entire time of the visit of proponent, so that latter had not the opportunity to unduly influence testator. *Id.*.....316

Testator directed that the residue of his real estate should, upon the decease of his wife, to whom he had given the income thereof for life, descend (*inter alia*) "to my sisters and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns. The children of any of my sisters or my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife." A sister of testator had died before the execution of the will, leaving a son whom testator had no reason to disinherit. *Held*, that such son was entitled to take the share his mother would have received had she survived tes-

tator's widow, not by way of substitution, but as a substantive independent original gift. *Matter of Howard*.....346

Such will directed payment of the income to the widow for life or until her remarriage, and in the latter event she was to receive only one-half the income. The widow remarried, and thereupon the executor paid half the income to the testator's father (to whom testator gave the estate upon his wife's death) for his life, and upon his decease (prior to the wife's death), paid a part of the income to one of the residuary legatees under the father's will. *Held*, that the moiety of the income which lapsed upon the widow's remarriage became a part of the residue. *Id.*.....346

As such payments to the father had been allowed on a prior account of the executor, the judicial settlement thereof was *res adjudicata* on the subject. *Id.*..... 346

The payment to the father's residuary legatee, who was also one of the residuary legatees under testator's will, should be treated as a payment to her upon her distributive share. *Id.*.....346

The executor will not be charged with interest on the funds of the estate after the death of the widow, when conflicting claims, which are being litigated, are made to the residue, and he holds the funds in readiness to pay the parties entitled thereto on the termination of such litigation. *Id.*..... 346

A testator devised and bequeathed to his wife, the use, occupation, income and profit of all his real and personal estate for her life, and directed that two of his sons (also named as his executors) should cut, haul and prepare for burning, firewood sufficient for her use. No duties were charged upon the executors with respect to the application of the income. *Held*, that the gift of the income of the real estate to the wife created an estate in the realty itself, and that the executors were not bound to account for the income of the real estate, or as to the cutting of wood and timber. *Matter of Goetschius*.....371

A testator left his personalty to the Trustees of the New York Annual Conference of the Methodist Episcopal Church, upon trust to supply the interest annually as salary of the pastor of St. Paul's Methodist Episcopal Church at Athens, Greene County, New York, provided that if the said St. Paul's Church should erect a parsonage for its pastor it might draw upon said Trustees for the amount necessary therefor, and provided further that if the last mentioned church should become extinct, the Trustees should turn over the trust funds to the Board of Church Extension of the Methodist Episcopal Church. *Held*, that as there was no limitation upon the suspension of the absolute ownership of testator's personal property, except at the termination of the corporate existence of St. Paul's Methodist Episcopal Church, and as there was no limitation of the time for the erection of the parsonage, the will was contrary to 1 Rev. St. p. 773, sec. 1, providing that the absolute ownership of personal property should not be suspended for a longer period than two lives in being at testator's

death, even though (having reference to the first provision) the Methodist Church at Athens had, before testator died, purchased a parsonage which was not free from debt, as it was the nature, not the execution, of the power that determined its validity. *Matter of Williams* 414

A testator gave to his wife the income of all his property, both real and personal, "as long as she lives, for her benefit and support," but out of the income she was to pay all necessary repairs upon the buildings, and all taxes, etc. The only authority the executors were to exercise during the wife's life was to pay debts and funeral expenses. After her death they were directed to sell the property and pay the legacies enumerated in the will. Testator also directed that his two sons should not come into possession of their property until after his wife's death, unless she consented thereto in writing. *Held*, that the widow took a life estate under the will, and no title to testator's property or control thereof during the wife's life was given to the executors except to pay his debts and funeral expenses. *Matter of Turfler* 421

A testator bequeathed to his brother \$1,000 in lieu of all claims of his brother against his estate, and appointed his son trustee of the bequest "to use it for the comfortable support of my said brother, and to pay his funeral expenses," and if any part should remain after the decease of his brother, to divide same amongst testator's sons and daughters. *Held*, that the will neither expressly nor impliedly conferred upon the trustee any authority over petitioner's person, and that he could not compel the latter to reside with him, nor dictate as to where he should reside. *Matter of Riley*.....439

The petitioner was entitled to demand and receive from the trustee such portion of the legacy as was necessary for his support, without regard to the question of his ability to support himself. *Id.*.....439

As the will did not authorize the trustee to determine the amount to be paid for the support of the beneficiary, and did not authorize the beneficiary himself to determine the amount, such amount should be fixed by the court. *Id.*..... 439

A testatrix bequeathed a portion of her estate upon trust to pay the income to her nephew William for life, and upon his decease to pay the principal to his daughter Ella should she survive him, but in the event of her decease without issue her surviving. "subject to the trust hereby created," the principal was to be paid to her two nieces and a grandnephew. *Held*, that the time of the death of Ella referred to her death without issue pending the trust, that is, during her father's lifetime, and as she had survived him, and the trust was therefore ended, she was entitled to the principal absolutely. *Matter of Odell*.

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*On an application for the probate of a certified copy of a will and codicil of a decedent who died resident in Pennsylvania, in which State the will and codicil had been proved, it appeared that the attestation clause to the will did not state the witnesses signed at the request of

the testator, and that the laws of Pennsylvania did not require proof of such request, which was essential under the statute of this State. The surviving witness, however, testified that the testator presented the will to him with his name already signed to it, and requested him to be a witness thereto, and that he signed it accordingly, but he could not recollect whether the other witnesses were present. The handwriting of the testator and of the other subscribing witnesses were proved. *Held*, that the will was sufficiently established. *Matter of Klett* 477

When a testator presents a paper to a witness with his name already signed to it, and declares it to be his will, it is tantamount to an acknowledgment of his signature. *Id.*.....477

The New York statute does not require that the witnesses should sign in the presence of each other. *Id.*.....477

In such case the only surviving witness (a lawyer) to the codicil could not swear positively that he saw the deceased sign it, or that the deceased declared the paper to be a codicil to his will, but he testified he prepared the codicil at decedent's bedside and at his dictation, and that he believed the attestation clause, which stated that he "published" the paper as such, to be true. He also testified that the other witnesses either signed at the request of the deceased, or at his (the lawyer's) request with testator's consent. The handwriting of testator and of the deceased witness was proved by another witness. *Held*, that the requirements of the statute were complied with. *Id.*.....477

When a codicil says, "I, Frederick Klett, the within named testator," and correctly refers to the date of the will, thus allowing the inference to be drawn that it was endorsed upon or appended to the will—*held*, that the proving of the codicil proves the will. *Id.*.....477

One of the witnesses to a will testified he did not remember seeing testatrix sign the paper or make her mark, and another witness swore positively he did not. Their evidence did not disclose that either of them was in the room when the mark was made, but the third witness (the attorney who drew the will) testified that the whole business of the preparation, execution and witnessing of the paper was done at the same interview, including the signing by the deceased and the three witnesses. The other witnesses testified that neither of them saw the attorney sign as a witness. *Held*, that the proof was not satisfactory of the subscription by the testatrix in the presence of two witnesses, and probate should be refused. *Matter of Nevins*.....486

Testatrix made her will at the age of 80, leaving legacies to her brothers and sisters, amounting to about one-third of her estate, and bequeathing the residue to her nephew and niece, with whom she had then resided about two months, and with whom she continued to reside till her death, about five years subsequently. She had at one time declared her intention to leave her property equally between her brothers and sisters. There was no direct evidence of restraint or undue influence, nor could same be inferred from the evidence. The

nephew and niece testified they knew nothing of the will having been made or of its contents till some time after testator's death. *Held*, that undue influence was not established. *Matter of Mabie*.....503

Although such a testatrix was just beginning to betray evidence of senility from the fact that her memory was impaired, and that she would fail to recognize acquaintances or call them by wrong names, and there was also evidence of eccentricities and peculiarities in her actions and conduct, *held*, that as she remembered all her immediate relatives, all of whom were mentioned in the will, and as the aggregate of the legacies showed she had a clear comprehension of the amount of her estate, and that no one but herself gave the particulars for the provisions thereof to the attorney who prepared the will, she had sufficient testamentary capacity, although the case was a marginal one. *Id*..... 503

A testator, by the fifth clause of his will, provided for the investment during the lifetime of his widow of the surplus of his personal estate after carrying out the provisions of his will, and directed the division of the investment and its accumulations, together with his residuary estate, among certain designated persons upon the death of his widow. *Held*, that the provision was invalid, as involving an accumulation of the income and profits of personal property not authorized by 4 Rev. Stat. (8th ed.) p. 2516, pt. 2, tit. 4, c. 4, secs. 3 and 4. *Matter of Roos* 513

Notwithstanding the illegality of the direction for accumulation of income, the provision for the ultimate division of the principal of the fund is not illegal. *Id*.....,..... 513

The distribution of such accumulated income is provided for by 4 Rev. Stat. (8th ed.) p. 2435, tit. 2, art. 1, c. 1, sec. 40, declaring that when, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or ownership, during which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate, and such section applies to personal as well as to real property. *Id*...513

A provision in the will for the annual payment of \$1,000 to the executors by certain devisees mentioned in the second paragraph of testator's will does not, in itself, involve an unlawful, or any, accumulation, as such annual payments will go into the *corpus* of the residuary personal estate, unless otherwise appropriated for the lawful purposes of the will, and augment such *corpus* for investment and ultimate division and distribution. *Id*.....513

When the execution of a will has been proved, the presumption is raised that testatrix knew its contents. *Matter of Hall*.....516

In such case, however, if there is evidence of fraud and undue influence, affirmative proof of knowledge by testatrix of the contents becomes necessary. *Id*..... 516

When the evidence shows that five days before the execution of her will the testatrix heard it read to her, and that at the time of execution

she declared in the presence of witnesses that she knew its contents, and that at the time of such execution she was of sound mind—~~and~~, that this constituted affirmative proof that testatrix had knowledge of the contents of the will. Id.....516

If when testatrix executed her will, she fully comprehended the business she was about to transact, and had in view the nature and extent of her possessions, and knew those who had claims upon her bounty, and acted of her own free will, it is immaterial that about eight days previously she had recovered from a stupor which the doctor pronounced coma, and which had lasted a few days. Id.....516

No presumption of want of testamentary capacity arises from old age alone, nor from enfeebled condition of body or mind.....550

Where it has been once proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is upon the party who alleges it. Id.....550

Where the alleged testator is quite old and somewhat weakened, by reason of age and infirmities, both in body and mind, the burden of proof is shifted upon the party in whose interest an important change in the will is made. Id.....550

The presumption, which the law raises under such circumstances, is one of fact and not of law, and may be repelled. Id..... 550

A will may be proved by evidence other than the testimony of the subscribing witnesses. Matter of Johnson.....579

A mind partially clouded by drink may execute a valid will. Id..579

The fact that the testator had an epileptic fit does not raise a presumption of disability after he has recovered from the attack. Id...579

The act of a party addicted to intemperance, in disposing of his property, will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, through kind offices springing from attachment or affection. Id.....579

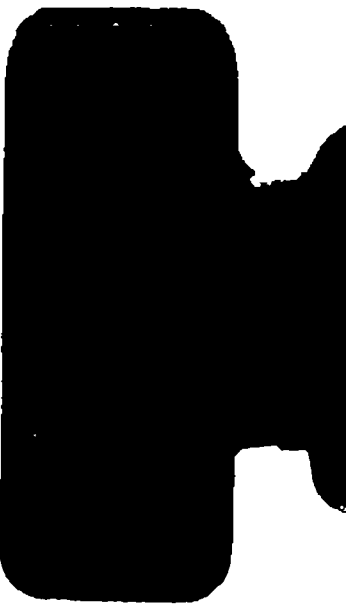
When it appears that a will offered for probate was revoked by a second will, the mere fact that the testator destroyed the subsequent will, without more, does not revive the former will, as it is provided by the Revised Statutes that the destruction, cancellation or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive the first will, or unless, after such destruction, cancelling or revocation, the testator shall duly republish his first will (3 Rev. St. [Birdseye's Ed.] p. 3345, sec. 53). Matter of Forbes.....590

WITNESS TO WILL—

A witness, who is an executor, is not an interested party within meaning of Code Civ. Pro. 829, in proceedings to probate a will. Matter of Gagan231

An attorney who draws, and is a subscribing witness to, a will, may testify as to its preparation and execution under amendment to Code Civ. Pro. sec. 836 of 1892, which was declaratory of the law as it then stood. Id..... 231

E. E. M.



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